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No.

In The

Supreme Court of the United States

October Term, 1997

CONDOR INSURANCE COMPANY,

Petitioner,

vs.

LISA CHRISTINE ERIKSEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

GREGORY F. STANNARD
Law Offices of Gregory F. Stannard
2450 Broadway, Suite 550
Santa Monica, California 90404-3064
(310) 315-6366

LARRY A. ROTHSTEIN
Attorney at Law
21700 Oxnard Street, Suite 960
Woodland Hills, California 91367-3642
(818) 716-2662

HARRY W.R. CHAMBERLAIN II
Counsel of Record
MARTHA A. SHEN
GINSBURG, STEPHAN, ORINGHER & RICHMAN
A Professional Corporation
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067-4012
(310) 557-2009
Attorneys for Petitioner Condor Insurance Company

135 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner Condor Insurance Company seeks redress by this Court from a default judgment obtained against its insureds, and enforced against its policy, through a statutory process which inherently deprived Condor of due process protections guaranteed by the Fourteenth Amendment. Because the judgment in the original action was obtained without petitioner's knowledge or opportunity to be heard, that judgment is constitutionally void and should be set aside.

The facts are simple and uncontroverted: Within a one year period in 1988 and 1989, respondent Lisa Christine Eriksen was involved in five separate, unrelated automobile accidents. The last of the five involved a cement truck owned by Quality Rock Company, operated by its employee William Joseph Schuler and insured by Condor. The police report taken at the scene found Eriksen solely at fault and described the damage to her vehicle as "moderate." Eriksen then sued, in a single lawsuit, all of the drivers involved in the five accidents. Neither Quality Rock nor Schuler were personally served, neither answered and Eriksen obtained a default judgment against them for an amount in excess of $228,000, based on an unsegregated "statement of damages" relating to all five accidents. Under a California Public Utilities Commission regulation and other insurance statutes, Condor became obligated to pay the "final judgment" against its insureds — without prior notice or trial on the merits — giving rise to the following issues:

1. Was the default judgment taken against Condor's insureds void on its face, in violation of the fundamental notice and due process requirements of the Fourteenth Amendment of the United States Constitution?

2. Does the statutory and regulatory scheme in California[1] deprive insurers such as Condor of due process by denying it the opportunity to defend its insureds or otherwise contest the merits of such lawsuits?

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[1] And at least 35 jurisdictions including the Interstate Commerce Commission. (App. at pp. 88a-95a.)

PARTIES TO THE PROCEEDINGS

The parties to the underlying action, *Eriksen v. Condor Ins. Co., et al.,* Case No. BC 109937, California Superior Court for the County of Los Angeles are:

Respondent Lisa Christine Eriksen, an individual and resident of the State of California.

Petitioner Condor Insurance Company (Condor) is a California corporation and a licensed California liability insurer, with its principal place of business and administrative offices located in Calabasas, California.

Other parties to the underlying proceedings, who are not parties to this Petition are: Quality Rock Company, Inc., a defunct California corporation, and William Joseph Schuler, an individual of unknown residency.

CORPORATE DISCLOSURE STATEMENT

Condor is a wholly owned subsidiary of Amwest Insurance Group, a Delaware corporation, having its principal place of business and administrative offices in Calabasas, California.

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I

Petitioner Condor Insurance Company respectfully requests that a writ of certiorari issue to the California Supreme Court from its order denying discretionary review of the decision and judgment of the California Court of Appeal, Second Appellate District, Division Seven.

OPINIONS BELOW

(1) The Order of the California Supreme Court Denying Review, Case No. S067653, entered March 18, 1998, is reprinted in the appendix to this petition at p. 1a;

(2) The unpublished Opinion of the California Court of Appeal, Second Appellate District, Division Seven, 2nd Civil No. B109749, filed December 23, 1997, is reprinted in the appendix at pp. 2a-9a;

(3) The judgment of the Los Angeles County Superior Court in Case No. BC 109937, entered December 19, 1996, is reprinted in the appendix at pp. 10a-15a;

(4) The Order of the Los Angeles County Superior Court regarding the Motion of Defendant and Cross-Complainant Condor to vacate the underlying judgment as void on its face, in the alternative for summary judgment, or in the alternative for summary adjudication of issues and the Order regarding Eriksen's Motion for Summary Adjudication of Issues from the Minutes of the Los Angeles County Superior Court filed October 27, 1995, in Case No. BC 109937, is reprinted in the appendix at pp. 19a-23a;

(5) The Order of the California Court of Appeal, Second Appellate District, Division Seven, 2nd Civil No. B097952, filed December 14, 1995, denying Condor's Petition for Writ of Mandate, is reprinted in the appendix at pp. 24a-25a; and

(6) The Order of the California Supreme Court filed January 23, 1996, denying Condor's Petition for Review, California Supreme Court Case No. S050791, is reprinted in the appendix at p. 26a.

STATEMENT OF JURISDICTION

The California Supreme Court's order denying discretionary review was entered on March 18, 1998, within 90 days of the filing of this Petition. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §2101(c) and United States Supreme Court Rule 13.1.

STATUTES AND REGULATIONS INVOLVED

Constitutional challenges to the validity of the default judgment taken against Condor's insureds Quality Rock Co. and William Joseph Schuler in the underlying action involve the application of California *Code of Civil Procedure* §§425.10, 425.11 and 580. Those statutes require a plaintiff in a personal injury action before entry of a default judgment to serve the defendant with a complaint and statement of damages specifying the nature of each defendant's alleged liability, and the amount of the general and special damages claimed by the plaintiff. Also at issue is the operation of California *Code of Civil Procedure* §473(b), which provides that an application for relief from a default judgment "shall be made within a reasonable time, in no case exceeding six months, after the judgment ... was taken." (The text of these provisions is set forth in the appendix to this petition, beginning at p. 77a.)

Eriksen's "form complaint" and statement of damages served pursuant to these statutes on Quality Rock and Schuler (which failed to segregate her claims relating to personal injuries allegedly suffered in five separate automobile accidents) violated the Due Process Clause of the Fourteenth Amendment, and rendered her default judgment "void on the face of the record." Such a judgment cannot, consistent with due process, be supported by "liberally construing" the pleadings. Nor can the defendants' request to vacate the void judgment be subjected to a particular time limit, as the decisions under review mistakenly concluded in this case.

Eriksen's post-judgment garnishment action against Condor involves the operation of California *Insurance Code* §11580(b)(2) and former *Public Utilities Code* §§3631-3635.[2] The California Public Utilities Commission (PUC) regulated the terms of insurance policies issued by admitted California insurers to "motor carriers" covering liabilities arising from their operations. The mandatory endorsement attached to Condor's policy provided "that no condition, provision, stipulation, or limitation contained in the policy or in any endorsement thereon or violation thereof, or this endorsement, by the insured, shall relieve the Company from liability or from the payment of [a] *final judgment.* . . ." (App. I at p. 56a (emphasis added).)

By compelling payment of a "final judgment" against Condor's insureds pursuant to the mandatory provisions of the PUC endorsement — without prior notice, the opportunity to defend or to contest the merits of the underlying claim until after the time for direct attack on the judgment had expired — California's regulatory scheme impermissibly allowed collateral estoppel effect to be given to the default judgment. This was a distinct and separate violation of Condor's rights under the Due Process Clause.

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[2]Former *Public Utilities Code* §§3631-3635 and PUC Gen. Order 100-Series were repealed and replaced by the enactment of the Motor Carriers of Property Permit Act (Cal. Vehicle Code §§34600, et seq.) which transferred the PUC's jurisdiction to regulate the mandatory provisions of policies issued to California motor carriers to the Department of Motor Vehicles. See Cal. Vehicle Code §34630; 13 Cal. Code of Regs. §220.06(a)-(c) (1998) (prescribing forms of insurance policies "to comply with insurance requirements imposed by Motor Carriers of Property Permit Act"). The former and current statutes and regulations referenced in this petition are reproduced in the appendix at pp. 82a-87a. See generally *Transamerica Ins. Co. v. Tab Transportation, Inc.*, 12 Cal.4th 389, 396-399, 906 P.2d 1341, 1344-1346 (1995) (describing the PUC's mandatory form endorsements at the time of Eriksen's accident).

STATEMENT OF THE CASE

A. The Underlying Action

1. *The Accident*

In a year apparently fraught with roadway mishaps, Respondent Eriksen claimed she was involved in five separate automobile accidents — all in Southern California — between November 25, 1988 and September 6, 1989. Eriksen's fifth and last accident, on September 6, 1989 involved a cement truck driven by Quality Rock's employee (Schuler) at the on-ramp of Las Virgenes Road and the U.S. 101 freeway in Agoura (Los Angeles County), California. (*Eriksen v. Schuler* Form Complaint, App. H at pp. 33a-41a; Police report, App. J at pp. 70a-76a.)

Responding to a call of a "property damage accident," California Highway Patrol Officer Carla O'Connor investigated and prepared an accident report which, on the basis of eyewitness accounts and officer O'Connor's own independent investigation of the accident scene, concluded that Eriksen was at fault and recommended that a complaint be filed against Eriksen with the Los Angeles County District Attorney's Office for making an "unsafe pass on the right" in violation of California *Vehicle Code* §21755. (Police report, App. J at p. 76a.) Eriksen was also cited for driving without a valid California driver's license. Schuler was found not to be at fault.

The only indication of personal injuries noted in the accident investigation report was a complaint by Eriksen of a "sore right arm," with officer O'Connor remarking that Eriksen would "seek own aid." (App. J at p. 71a.)

2. *Eriksen's Complaint for Personal Injuries Against Quality Rock, Schuler and Others*

On November 22, 1989 Eriksen filed a pre-printed "form complaint" for personal injuries styled as *Eriksen v. Schuler,*

et al., Los Angeles County Superior Court Case No. NWC053623 ("underlying action"), seeking damages from Schuler and Quality Rock, as well as three additional defendants alleged to have been involved in one of the five separate and distinct accidents.[3]

For all five accidents, Eriksen checked the box on her form complaint indicating that she had suffered general damages and "special damages" including wage loss, hospital and medical expenses, property damage, loss of use of property, and "loss of earning capacity." (App. H at p. 35a ¶¶ 8-10.) No amounts for general or special damages were specified in the complaint, but a statutory "statement of damages" separately filed and served, stated that: "[T]he nature and amount of damages sought in the above action for plaintiff, Lisa C. Eriksen, are as follows:

1. For general damages in the amount of $750,000;

2. For all medical and incidental expenses incurred in accordance to proof, amounting to approximately $8,279.00 to date;

3. For loss of earnings in accordance to proof, amounting to approximately $1,037.00 to date;

4. For future loss of earnings and earning capacity, amount unknown at this time;

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[3]Eriksen further alleged that defendant Jeffrey Krull had caused another accident on May 8, 1989 in Westlake Village (Ventura County), California. Defendant Jeffrey Ahrens allegedly caused an automobile accident involving Eriksen on December 8, 1988 at the intersection of Moorpark Road and the U.S. 101 Freeway in Thousand Oaks (Ventura County). Eriksen further complained that on November 25, 1988 Deborah Majick negligently operated her motor vehicle resulting in an accident with Eriksen at Escondido (San Diego County). Four days later, on November 29, 1988 unknown defendants (identified by fictitious names Does 1 to 100) caused another motor vehicle accident that Eriksen also claimed resulted in her personal injuries and special damages. (Form Complaint, App. H at p. 33a-41a.)

5. For such other relief as the court deems proper." (App. H at pp. 42a-43a.)

The statement did not specify how much was sought against each driver or for each accident. Quality Rock was served with the underlying action and statement of damages by "substituted service" on June 20, 1991. Schuler and unrelated defendants were served by publication in a legal newspaper in December 1991. The defaults of Schuler, Quality Rock and an unrelated defendant, Deborah Majick, were taken on March 13, 1992. Over a year later, on March 22, 1993 a default judgment was entered against Quality Rock and Schuler in the sum of $228,500, apparently for the "sore arm" Eriksen had complained of to officer O'Connor. (Ct. App. Opn., App. B at p. 4a.) Of that sum, $220,000 was awarded as "general damages" for her bodily injuries, and $8,500 as special damages. Apparently, no recovery was obtained against Ms. Majick or any of the other named defendants.

3. *Efforts by Quality Rock to Set Aside the Default Judgment*

In November 1993 (more than four years after the traffic accident and over 9 months after the entry of the default judgment), Quality Rock received a notice of levy on Eriksen's default judgment, seeking to enforce the judgment — then totaling in excess of $240,000 with interest and costs. (Quality Rock mtn. to vacate, App. I at pp. 59a-60a; Jones decl. ¶ 7, App. I at p. 66a.)

Quality Rock engaged counsel who moved to vacate the default.[4] On January 12, 1994, Quality Rock's motion to set

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[4]Schuler never made an appearance in Eriksen's lawsuit. The motion to vacate was made pursuant to California *Code of Civil Procedure* §473, and supported by declarations of various Quality Rock employees and officers, that the judgment was obtained through "mistake, inadvertence, surprise, or excusable neglect." (App. I at pp. 59a-66a, including

aside the default judgment was denied as untimely.[5] (Cohn decl. ¶ 10, App. I at p. 51a.) Quality Rock timely appealed the denial of the motion to vacate; however, it abandoned that appeal when it subsequently petitioned for bankruptcy. (*Id.* ¶¶ 23-24 at pp. 53a-54a.)

4. *Condor, As the Liability Insurer For Quality Rock and Schuler, Did Not Receive Notice of the Default Judgment Against Its Insureds Until December 1993, After the Six-Month Statutory Time Limit For Direct Attack Had Expired*

On or about December 3, 1993 some nine months after the entry of the default judgment (and three months after the statutory period within which the default judgment could have been directly contested), Condor first received notice of the judgment from Quality Rock's insurance agent. Subsequently, Eriksen made written demand on Condor to satisfy the default judgment against Quality Rock and Schuler. (Cohn decl. ¶¶ 23-24, App. I at pp. 53a-54a.; Cohn supp. decl. ¶ 2, App. J at pp.68a-69a.)

Condor then sought leave from the superior court to intervene in the underlying action and moved to vacate the default judgment as constitutionally void on its face because Eriksen's statement of damages provided insufficient notice to Quality Rock and Schuler as to the damages Eriksen was seeking specifically with reference to the September 6, 1989

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declarations of Patricia Lombardo, Quality Rock's office secretary and Wayne Jones, Quality Rock's semi-retired president). At the conclusion of his declaration, Mr. Jones stated: "If this judgment cannot be set aside and the matter tendered to our insurance company, this judgment will force the [Quality Rock] corporation into bankruptcy." (Jones decl. ¶¶ 4-9, App. I at pp. 65a-66a; Lombardo decl. ¶¶ 2-13, App. I at pp. 62a-63a.)

[5]Under §473, a motion to set aside a default judgment on equitable grounds must be brought within six months from the date of entry of judgment. (App. K at p. 79a.)

accident. However, Condor's motion to vacate never came to a hearing because Quality Rock's pending appeal from its own motion to vacate was deemed abandoned and dismissed for lack of prosecution as a result of its December 1994 bankruptcy. (Cohn decl. ¶ 10 and ¶ 23, App. I at pp. 51a, 53a-54a; Condor mtn. to vacate j, App. H at pp. 27a-32a.)

B. Procedural History of the Present Action

1. *Eriksen's Post-Judgment Garnishment Action Under California Insurance Code §11580 to Recover the Proceeds of Condor's Liability Insurance Policy*

Before her judgment against Quality Rock and Schuler became final, Eriksen commenced the present action for garnishment of Condor's insurance policy in August 1994, *Eriksen v. Condor Insurance Company, et al.,* Los Angeles County Superior Court Case No. BC 109937 ("present action"). The action sought to compel Condor to pay Eriksen the judgment she had obtained against Quality Rock and Schuler pursuant to California *Insurance Code* §11580 and to recover additional damages under several other theories, including breach of the covenant of good faith and fair dealing.[6]

Condor answered and cross-complained against Eriksen, Quality Rock and Schuler seeking declaratory relief that the default judgment in the underlying action was void and unenforceable under the terms of its policy, under California law, and under federal due process principles. (Ct. App.

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[6] In the absence of an assignment of the insured's contractual rights, California law generally forbids direct actions by third party plaintiffs to recover the proceeds of liability insurance policies until a final liability judgment is rendered against the policyholder. See *Moradi-Shalal v. Fireman's Fund Ins. Cos.,* 46 Cal.3d 287, 305-313, 758 P.2d 58, 68-75 (1988); *Insurance Code* §11580(b).

Op., App. B at pp. 3a-5a; Order denying mtn. to vacate, App. E at p. 21a.)

After Quality Rock's bankruptcy had stayed proceedings in the present action for several months, Condor renewed its as-yet unheard motion to vacate the judgment and alternatively sought summary adjudication that the underlying default judgment was void in violation of notice and due process requirements for the entry of default judgments. Eriksen made a cross-motion for summary adjudication claiming entitlement to the proceeds of Condor's policy to satisfy the judgment. On October 27, 1995, the trial court denied Condor's motions and granted Eriksen's motion for summary adjudication on the ground that "there has been no showing of extrinsic fraud or mistake, (and therefore) the defendant insurance company is liable on the judgment." (App. E at pp. 21a.)

2. *The Outcome of Condor's Appeals From The Judgment Against It In The Present Action*

Because the Court's ruling on Eriksen's motion for summary adjudication was not a final judgment on all claims in the present action, Condor immediately pursued a statutory petition for writ of mandate requesting relief from the California Court of Appeal.[7] On December 14, 1995, the Second Appellate District, Division Seven in Case No. B097952 denied the petition for writ of mandate. Condor's petition for discretionary review by the California Supreme Court was denied on January 23, 1996, California

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[7]California procedure allows a party adversely affected by an order granting summary adjudication to seek interim appellate review, before entry of a final judgment, by a prerogative writ petition filed within 20 days after entry of the order. Cal. Code of Civ. Proc., §437, subdiv. (e). Interim appellate review, if denied, does not otherwise preclude the petitioning party's right of direct appeal on the adjudicated issue after a final judgment is rendered in the trial court. *Kowis v. Howard,* 3 Cal.4th 888, 894, 838 P.2d 250, 253 (1992).

Supreme Court Case No. S050791. (App. F at pp. 24a-25a; App. G at p. 26a.)

After further proceedings in the superior court, the parties agreed, at a pre-trial settlement conference on October 10, 1996, to dismiss their remaining causes of action, leaving only Eriksen's first cause of action for payment of the default judgment and Condor's motion to vacate that judgment on constitutional grounds. (Ct. App. Opn.; App. B at pp. 4a-5a.) The superior court denied Condor's motion to vacate and adjudicated the first cause of action against it. Judgment was entered on December 19, 1996 in favor of Eriksen in the amount of $228,500 plus interest from March 22, 1993. Condor then timely filed a notice of appeal from the judgment. (App. C at pp. 10a-15a; App. D at pp. 16a-18a.)

In an unpublished opinion filed December 23, 1997 the Court of Appeal affirmed the judgment in favor of Eriksen. Addressing Condor's constitutional and statutory challenges to the default judgment the Court of Appeal concluded that Schuler and Quality Rock had received valid service of a statement of damages, and "[d]ue process did not require a specific breakdown among the defendants" named in Eriksen's personal injury action arising out of the five separate traffic accidents. (Ct. App. Opn.; App. B at p. 8a.) The appellate court reasoned:

> A pleading must be ***liberally construed,*** with a view to substantial justice between the parties. (Code Civ. Proc., §452.) ***Liberally construing [Eriksen's] statement of damages,*** we find it provided [Condor's] insureds with notice that a default could result in a judgment of up to $750,000 in general damages and $9,316 in special damages. It was enough information to advise them of the great risk they were taking in not filing an answer. Since [Eriksen] recovered less than those amounts, the judgment was not void. (Ct. App. Opn.; App. B at pp. 7a-8a, emphasis added.)

Condor timely petitioned the California Supreme Court requesting discretionary review of the Court of Appeal's decision and judgment. That petition was denied on March 18, 1998. (App. A at p. 1a.) This petition for a writ of certiorari ensued.

REASONS WHY THE PETITION SHOULD BE GRANTED

First, Condor's Fourteenth Amendment due process rights have been violated by the California courts impermissibly applying a "liberal" rather than "strict" construction of Eriksen's statement of damages resulting from the September 6, 1989 accident.

Second, Condor's Fourteenth Amendment due process rights were additionally violated by the interpretation of California insurance regulations as allowing Eriksen to enforce the default judgment against Condor without notice of the prior action or contest on the merits.

This case presents important questions concerning the due process protections that litigants, and their liability insurers, are entitled to receive before a default judgment may be given collateral estoppel effect.

Acknowledging that the right to notice and the opportunity for a full and fair adversarial contest are of "paramount concern," California statutes codify certain minimum due process protections — requiring that a plaintiff in a civil action provide the defendant with a "reasonably specific and accurate" statement of the nature of her damages claims before a default judgment may be entered. *Greenup v. Rodman,* 42 Cal.3d 822, 826, 726 P.2d 1295, 1297 (1986). These requirements are subject to "strict" rather than "liberal" construction, and any deficiency in the notice provided by the plaintiff requires that the default judgment be set aside. *Ibid.* The nature of the claims asserted in Eriksen's "form complaint" and her unsegregated statement of dam-

ages, lumping together claims against various individuals involving five separate accidents, was constitutionally deficient. As such, the default judgment she obtained against Quality Rock and Schuler was void on its face.

California rules also routinely allow a default judgment to be set aside within six months after entry based upon a showing by the defendant (or its liability insurer) of "mistake, inadvertence or excusable neglect." However, that procedural safeguard was easily circumvented by Eriksen, who waited until after the expiration of the six-month time limit before attempting to levy and execute on the judgment. Quality Rock, and subsequently Condor, were thereby deprived of any meaningful opportunity to demonstrate that statutory grounds existed to vacate the default judgment, and the California courts overlooked these fundamental due process considerations in denying Condor's requests for relief as "untimely."

In the subsequent garnishment action brought by Eriksen to recover the default judgment under the insurance policy, Condor's Fourteenth Amendment rights were independently violated. The courts impermissably interpreted the PUC's mandatory endorsement for motor carrier liability carriers as giving res judicata effect to the default judgment — without Condor having prior notice or the ability to defend the claim on the merits.

Procedural remedies that enable a party "to enlist the aid of the State to deprive another of his or her property" undoubtedly involve state action "substantial enough to implicate the Due Process Clause." *Doehr v. Connecticut,* 501 U.S. 1, 10-11 (1991). This Court has strictly scrutinized, and generally disapproved of, state procedural remedies which deprive a party, even temporarily, of property rights without prior notice and the opportunity for a hearing

on the merits of the dispute. *Id.* at 9-11.[8] Here, deprivation of Condor's property rights is permanent.

Neither the California Supreme Court's decision in *Home Indemnity v. King,* 34 Cal.3d 803, 670 P.2d 340 (1983) nor the regulated language of Condor's PUC endorsement, can properly be read as a "waiver" of constitutional defenses to Eriksen's default judgment. California's regulatory scheme requires the filing of an insurance certificate for all licensed trucking companies containing this mandatory wording. *Home Indemnity* merely held that, in light of the endorsement, contract defenses arising from the insured's breach of policy conditions may not be asserted as a defense to an otherwise "final," and validly obtained judgment for personal injuries covered by the policy. Condor's constitutional right to notice and an adversarial determination of the claim exists independently of any notice due from Quality Rock under the contract.

The California courts nevertheless accepted Eriksen's view of the PUC endorsement, ordering Condor to pay the default judgment despite the lack of notice and opportunity to dispute Eriksen's claims on their merits. California is one of at least 35 jurisdictions, including the Interstate Commerce Commission, that requires the filing of motor carrier liability policies with a regulatory agency containing similar mandatory language regarding the payment of "final judgments." (App. K at pp. 88a-90a; App. L at p. 91a, et seq.)

Accordingly, California's interpretation of this language as amounting to a waiver of the carrier's constitutional due process rights has broad implications in the context of similar motor carrier liability policies — and other actions in which a plaintiff attempts to make *offensive use* of the

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[8]See also *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478-486 (1988); *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 340 (1969); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 606-608 (1975).

doctrine of collateral estoppel to enforce a default judgment against a third party who had no notice of the prior action nor the opportunity to contest the merits. See *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329-331 (1979). Without attempting to prioritize one constitutional violation over another, Condor's analysis begins in chronological order with the infirmities of the default judgment.

I. Eriksen Procured The Default Judgment Against Condor's Insureds In Violation Of Due Process Which Required "Strict Construction" Of The Notice Specifying The Nature Of Her Liability And Damages Claims Against Them As A Result Of The September 6, 1989 Accident

A. California's Statutory "Due Process Protections" Required Before Entry Of A Default Judgment Were Not Satisfied In This Case

A defendant contesting a default judgment under California law and federal constitutional doctrine is entitled to receive certain minimal due process protections. *Greenup v. Rodman,* 42 Cal.3d 822, 824-826, 726 P.2d 1295, 1296-1297 (1986). Due process mandates that any form of "substituted service be reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied." *Milliken v. Meyer,* 310 U.S. 457, 463 (1940); *Greenup,* 42 Cal.3d at 829, 726 P.2d at 1299.

Several California procedural statutes relating to the contents of the complaint, service of process, and entry of default judgments have codified the fundamental constitutional protections of notice and due process. *Parish v. Peters,* 1 Cal.App.4th 202, 206-207, 1 Cal.Rptr. 2d 836, 839 (1991) citing *Greenup,* 42 Cal.3d at 826; *Petty v. Manpower, Inc.,* 94 Cal.App.3d 794, 798, 156 Cal.Rptr. 622, 623 (1979) ("California has codified constitutional protection of notice"

regarding the nature of plaintiff's claims and damages recoverable in the event of default). *Code of Civil Procedure* §§425.10, 425.11 and 580 require the plaintiff seeking entry of default to have provided *both* a statement of facts "constituting the cause of action," and a statement of damages that is "reasonably specific and accurate" to apprise the defendant of her demands. *Greenup,* 42 Cal.3d at 826, 726 P.2d at 1297; *Parish,* 1 Cal.App.4th at 207-208, 210, 1 Cal.Rptr.2d at 839-840, 841.

Since Eriksen's underlying action against Quality Rock and Schuler was a personal injury action, her form complaint could not state the amount of damages being sought. (Ct. App. Opn., App. B at pp. 5a-6a.)[9] However, before obtaining a default judgment, Eriksen was required to serve a formal statement of damages on the defendants. (*Ibid;* Code Civ. Proc., §425.11.) *Code of Civil Procedure* §§425.10, 425.11 and 580 thus embody California's statutory "expression of the mandates of due process, which require 'formal notice of potential liability.' " *Parish,* 1 Cal.App.4th at 207, 1 Cal.Rptr.2d at 839.

Heretofore, the California Supreme Court has steadfastly maintained that constitutional due process considerations require "strict construction" of these notice and pleading rules before a valid default judgment may be rendered against a non-appearing defendant:

> It is precisely when there is no trial, however, that formal notice, and therefore the requirement of section 425.10 [regarding the nature of plaintiff's liability claims and damages] becomes critical. Notice is at the heart of the provision, as the Legislature underscored

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[9]The legislative prohibition against stating the amount of damages in the complaint itself relates to the potential for embarrassment and adverse publicity to personal injury defendants stemming from a lawsuit with a prayer for monumental damages. See *Jones v. Interstate Recovery Service,* 160 Cal.App.3d 925, 928, 206 Cal.Rptr. 924, 925-926 (1984).

> by adding section 425.11 which provides ... "that plaintiff shall give notice to the defendant of the amount of special and general damages sought" before obtaining a default judgment. ***It would undermine this concern for due process to allow the judgment herein to stand despite plaintiff's failure to meet the requirements of sections 425.10 or 425.11.*** *Greenup v. Rodman,* 42 Cal.3d at 827, 726 P.2d at 1298 (emphasis added, internal citations omitted).

Due process then remains the "paramount concern" in reviewing the validity of a default judgment "regardless of any other policy which might be furthered if the notice requirement were to be relaxed." *Parish,* 1 Cal.App.4th at 208, 1 Cal.Rptr.2d at 839; *Greenup,* 42 Cal.3d at 828, 726 P.2d at 1299.

B. *Eriksen's Form Complaint and Unsegregated Statement of Damages Were Constitutionally Insufficient To Support the Default Judgment*

Eriksen's form complaint did not convey the basic information about her case that Quality Rock and Schuler were constitutionally entitled to receive: "The complaint in the present action 'is one of the skeletal, preprinted forms supplied by the Judicial Council, with boxes to be checked for the appropriate allegations .... Stripped of its boxes, the prayer reads: 'Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for compensatory damages (Superior Court) according to proof.' " *Parish,* 1 Cal.App.4th at 215-216, 1 Cal.Rptr.2d at 845 (internal citations and brackets omitted).

Likewise, the unsegregated "statement of damages" served by Eriksen (assuming it was actually delivered) by means of "substituted service" on Quality Rock cannot pass

constitutional muster.[10] Her section 425.11 statement was defective in failing to clearly indicate the specific *amount demanded* from Quality Rock and Schuler for the September 6 accident, leaving to speculation the amount of damages she was seeking, the nature of their liability for her injuries, and even what those injuries might be (e.g., a "sore right arm" as opposed to brain damage).

"[A] bright-line rule for the requisite notice of damages [applies]: a specific amount of damages must be averred". *Parish,* 1 Cal.App.4th at 214-215, 1 Cal.Rptr.2d at 844-845 Nothing less will do.

Where *either* the notice setting forth the defendants' alleged liability, or the specification required in the statement of damages served prior to the entry of a default judgment, are constitutionally deficient the judgment is "void on its face."[11]

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[10]Service upon a clerical employee does not qualify as personal service. (Ct. App. Opn., App. B at pp. 2a-3a.) Subsequent mailing to Quality Rock's office of Requests for Default do not satisfy the notice requirements: "Employees of such defendants are more likely to fail to recognize the importance of such mail and misplace it. Also, documents sent by mail are more likely to be lost." *Plotitsa,* 140 Cal.App.3d at 760, 189 Cal.Rptr. at 772; *Parish,* 1 Cal.App.4th at 213-214, 1 Cal.Rptr.2d at 843 ("neither the mailed copy of the application for default nor the fact there is a 'prove up' hearing is sufficient to satisfy the defendant's due process right to choose to defend").

[11]For example, *Schwab v. Rondel Homes, Inc.,* 53 Cal.3d 428, 808 P.2d 226 (1991), held a default judgment was "void on its face" because the prayer for statutory damages sought "an amount *according to proof* but 'no less than $250' and punitive damages in the amount of $500,000." 53 Cal.3d at 434-435, 808 P.2d at 228-229 (emphasis added). The same constitutional rule of "strict construction" required vacation of a default judgment where the general and special damages being claimed against the defaulting defendant vaguely stated "only the total amount of damage sought, without a breakdown as between special and general damages." *Plotitsa v. Superior Court,* 140 Cal.App.3d 755, 761-762, 189 Cal.Rptr. 769, 772-773 (1983).

Eriksen's damage statement simply lumped together a claim for "general damages" of $750,000 attributable to *all five* accidents. Insofar as her "special damages" were concerned, the statement requested medical and incidental expenses and lost earnings incurred "in accordance to proof [sic]," setting forth only the "approximate" amounts claimed through the date the statement was prepared (6/18/91). (Statement of damages, App. H at pp. 42a-43a.) In addition, Eriksen claimed: "future lost earnings and earnings capacity, ***amount unknown at this time***" and "such other relief as the court deems proper." (*Id.* at p. 43a.)

Even more troubling is the fact that all of the named defendants were not jointly and severally liable for Eriksen's damages under California law. Named defendants Deborah Majick, Jeffrey Krull and Jeffrey Ahrens were allegedly responsible for three completely separate accidents involving Eriksen that occurred at different locations and on three different dates than the accident involving Schuler. Condor's insureds were, at most, *successive,* not concurrent tortfeasors with those other defendants. See, e.g., *Carr v. Cove,* 33 Cal.App.3d 851, 854, 109 Cal.Rptr. 449, 451 (1973) (separate defendants responsible for successive auto accidents are successive tortfeasors and only *severally liable* for damages attributable to the accident for which each is responsible). Condor's insureds could only be held liable for those damages *specifically* attributable to Eriksen's accident with Schuler.[12]

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[12]Moreover, under California comparative fault principles applicable to joint and several tortfeasors who are involved in the *same* accident, no tortfeasor can be held *jointly* liable for non-economic damages, but only severally liable. See Cal. Civil Code, §1431.2; *Buttram v. Owens-Corning Fiberglass Corp.,* 16 Cal.4th 520, 527-528, 941 P.2d 71, 74-75 (1997); ("each defendant is liable for only that portion of the plaintiff's non-economic damages which is commensurate with that defendant's degree of fault for the injury").

In declining to address those deficiencies, the opinion of the Court of Appeal in this case erroneously invoked a rule of "liberal construction" applicable to pleading issues in contested cases. (Ct. App. Opn., App. B at pp. 7a-8a.) Rules of "liberal" construction cannot apply when a court is examining whether a default judgment meets fundamental fairness and due process requirements. *Schwab,* 53 Cal.3d at 439, 808 P.2d at 232 (due process requires that default judgment cannot be entered without "a reasonably specific and accurate statement of damages"); *Greenup,* 42 Cal.3d at 826, 726 P.2d at 1297. Only "strict construction" of Eriksen's form complaint and statement of damages will comport with due process. *Ibid.*

C. The Default Judgment Was Also Void Under The Constitutionally Based Doctrine Of "Extrinsic Fraud or Mistake"

Eriksen's constitutionally deficient notice of her liability and damages claims against Quality Rock and Schuler was further compounded by the failure of the California courts to vacate the default judgment in the underlying action and, for a second time, in this case as "untimely."[13] Condor, being potentially liable to indemnify a judgment against its insured, had standing to intervene to move to set aside the default judgment in the underlying action; provided it had received notice within the six-month time limit. Code Civ. Proc., § 473(b); *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 886, 587 P.2d 1098 (1978) ("the standing of [a

[13] As long as a motion to set aside the judgment is made within the six-month statutory time limit, relief is routinely granted, absent the clearest showing that the mistake or neglect was "inexcusable." Given the strong public policy (indeed, the constitutional right) in favor of "trial on the merits," any doubts are resolved in favor of providing relief from default and reversal of an order denying that relief will result. *Elston v. City of Turlock*, 38 Cal.3d 227, 235, 695 P.2d 713, 718 (1985); see also *Jade K. v. Viguri*, 210 Cal.App.3d 1459, 1473, 258 Cal.Rptr. 907, 915 (1989).

liability insurer] to set aside the default judgment which it might otherwise be required to satisfy is therefore clear."); *Nasonghkla v. Gonzalez*, 29 Cal.App.4th Supp. 1, Supp. 4, 34 Cal.Rptr.2d 379, 381 (1994).[14]

In Eriksen's present action to recover on Condor's policy, the trial court and Court of Appeal denied Condor's challenges to the underlying judgment concluding that the "extrinsic fraud or mistake" standard had not been met. (Ct. App. Opn., App. B at pp. 5a-8a; Trial Ct. Minutes, App. E at p. 21a.) Not so. The record amply demonstrates that the judgment was void on that independent ground as well.

Condor did not receive notice of the action until December 1993, well after the six months expired. If Eriksen had proceeded to execute on the judgment within the six-month time limit, questions of constitutional dimension could have been avoided altogether. When Quality Rock received the Notice of Levy in November 1993 it took action to set aside the default within a matter of days. The trial court found that its efforts were "untimely" when it denied the motion to set aside the judgment on January 12, 1994. (Cohn. decl. ¶ 10, App. I at p. 51a.)

Guided by this Court's precedent, California cases have given a broad interpretation to this equitable ground for

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[14] "A judgment or order which is invalid on the face of the record is subject to collateral attack .... It follows that it may be *set aside on motion*, with *no limit on the time* within which the motion must be made." 8 B. WITKIN, CAL. PROCEDURE, *Attack on Judgment in Trial Court*, § 202, p. 707 (4th ed. 1997) (emphasis added); R. WEIL & I. BROWN, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL, § 5:490, p. 5-104.3; (Rutter Group 1997) (void judgment may be challenged "*at any time*"). An insurer or judgment garnishee also has standing to seek equitable relief from the res judicata effect of a judgment long after the time for direct attack has passed. 8 B. WITKIN, CAL. PROCEDURE, *Attack on Judgment in Trial Court*, § 214 at p. 718; § 218 at pp. 721-722.

setting aside a default judgment. There need be no actual "fraud" or "mistake" in the strict sense. *Marriage of Park*, 27 Cal.3d 337, 342, 612 P.2d 882, 886 (1980). By its very nature, the word "extrinsic" simply means that the party was unfairly denied the opportunity to be heard. *Ibid*; R. WEIL & I. BROWN, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL, ¶¶ 5:438 to 5:439, p. 5-95. Extrinsic fraud or mistake "tends to encompass *almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing.*" *Estate of Sanders*, 40 Cal.3d 607, 614, 710 P.2d 232, 236 (1985) (emphasis added). Thus, extrinsic fraud or mistake has been found:

> [W]here the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff . . . [and, as a result,] that party has been prevented from presenting all of his case to the court. *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878); see also *Estate of Sanders*, 40 Cal.3d at 614, 710 P.2d at 236; R. WEIL & I. BROWN, CAL. PRAC. GUIDE: CIV. PROC. GUIDE, 5:441, P. 5-96.

This is such a case: The police report prepared on September 6, 1989 identifies Quality Rock by its PUC registration number. As required for all California motor carriers at the time of this accident, Condor's insurance certificate was on file with the PUC, and that certificate number also appears on the face of Officer O'Connor's accident report.[15] Tactically, Eriksen every reason to wait until after the expiration of the six-month time limit to directly attack a default judgment before attempting to execute on it. By doing so, she effectively precluded Condor and its insureds

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[15]The police report figured prominently in Quality Rock's unsuccessful motion to vacate the default judgment which was denied in January 1994 (see Lombardo decl., ¶¶ 5-8, App. at pp. 62a-63a), and Eriksen's own successful summary adjudication motion against Condor in October 1995. (Cohn supp. decl. ¶ 2 and attaching police report, App. J at pp. 68a-76a.)

from raising the statutory grounds of "mistake, inadvertence or excusable neglect" to set aside the judgment.[16]

II. Condor's Due Process Rights Were Additionally Violated By The California Courts' Preclusive Interpretation Of The PUC Insurance Regulations As Giving Res Judicata Effect To The Default Judgment

A. Consistent With Due Process, California Insurance Regulations Cannot Be Interpreted To Operate A Waiver Of Condor's Constitutional Right To Notice And The Opportunity To Contest Eriksen's Underlying Claims On The Merits

Due process prohibits application of res judicata principles to the default judgment in this case. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) instructs that the offensive use of the doctrine of collateral estoppel (i.e., by a plaintiff seeking to enforce a judgment rendered in one action against non-parties in a second action) is subject to constitutional limitations of "fairness"— including adequate notice and the opportunity for a full hearing of the issues in the prior proceeding. *Id.* at 326-331; *Richards v. Jefferson County,* 517 U.S. 793, 797-798 (1996).

> [A] State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings *without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give conclusive effect to a prior judgment against one who is neither a party nor*

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[16] It is therefore of no moment that the superior court also denied Condor's motion to vacate in the present action as untimely. (Trial Ct. Minutes 10/27/95, App. E at p. 21a.) Under the rationale employed by the trial court, if Condor or its insured had moved to set aside the default judgment on the 181st day after entry, that still would have been one day too late, and any argument Condor attempted to make "to set aside that judgment [would also have been] without merit." (*Ibid.*)

in privity with a party therein. Id. at 797 n. 4 (emphasis added, internal citation omitted).

For a California liability insurer in Condor's position to be "bound" by a judgment, due process requires, at a minimum, that (a) the insurer be timely notified of the action against its insured, and (b) afforded the opportunity to defend the claims asserted on their merits:

> The law is well settled that, where one is bound either by law or agreement to protect another from liability, he is bound by the result of a litigation to which such other is a party, *provided he had notice of the suit and an opportunity to control and manage it.*
>
> *Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co.*, 12 Cal.App.4th 501, 539, 15 Cal.Rptr. 2d 726, 745 (1993) (emphasis added); *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 237, 636 P.2d 32, 42 (1981).[17]

These sound due process limitations are applicable to actions by judgment creditors to garnish insurance policies. As the California Supreme Court has stated, "notwithstanding the expanded notions of privity [between insurer and insured], collateral estoppel may be applied *only if due process requirements* are satisfied." *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d at 875, 587 P.2d at 1102 (emphasis added). In post-judgment actions to recover on an insurance policy, "due process requires that the party to be estopped [here Condor] must have *an identity or community of interest with, and adequate representation by, the losing party in the first action* [Quality Rock and Schuler] as well as the circumstances must have been such that *the party to*

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[17] "All of the cases in which a judgment ***not on the merits*** has been found binding on the insurer were based upon the principle an insurer ***who has an opportunity to defend*** and wrongfully fails to do so is liable on the judgment against the insured." *Wright v. Fireman's Fund Ins. Cos.*, 11 Cal.App.4th 998, 1019, 14 Cal.Rptr. 2d 588, 594 (1992) (emphasis added).

be estopped should reasonably have been expected to be bound by the prior adjudication . . . ." *Ibid* (emphasis added); accord *Long Beach Grand Prix Assn. v. Hunt,* 25 Cal.App.4th 1195, 1200, 31 Cal.Rptr. 2d 70, 73 (1994).[18]

Imposing liability under Condor's policy for a default judgment — where Condor had no notice of the underlying lawsuit until more than four years after it was filed and had no opportunity to defend Quality Rock and Schuler — hardly rises to the level of the due process protections described above. Condor's privity with its insureds obviously did not assure that the issues which Eriksen now asserts are res judicata (namely, liability and damages collectible under Condor's policy of insurance) were "fully and vigorously" contested in the underlying action.[19]

There has never been an adversarial determination on the merits of Eriksen's claims. Quality Rock and Schuler were *defaulted* — the record is undisputed that Condor received notice from no one (neither Eriksen nor its insureds) in time to assume the defense in order to set aside the default based upon the inadvertence and excusable neglect of Quality Rock's "retiring" president Wayne Jones. (Jones Decl., App. I at pp. 65a-66a.) Eriksen had no incentive to enforce

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[18] Where a party wields a prior judgment or settlement " 'as a sword to enforce its rights as an indemnitee, due process mandates at a minimum appropriate notice and an opportunity for the indemnitor *to contest both liability and the amount of damages.*' " *Andradi v. Jennings,* 54 Cal.App.4th 307, 332, 62 Cal.Rptr. 2d 787, 801 (1997) (emphasis added).

[19] Cf. *Parkland Hosiery,* 439 U.S. at 329-331 & nn. 14-15 ("[t]he problem of unfairness is particularly acute in cases of *offensive estoppel*") (emphasis added); see also *id.* n. 16 ("a stronger showing that the prior opportunity to litigate was adequate may be required" where estoppel is used *offensively*); see also *Lytle v. Household Mfg., Inc.,* 494 U.S. 545, 552-554 (1990) (collateral estoppel could not be applied in violation of non-party defendants' Seventh Amendment right to jury trial).

her judgment right away, indeed she had every reason to delay. As is now obvious, Eriksen was banking on the California courts giving preclusive effect to Condor's mandatory PUC endorsement which provides that the insurer will not raise contractual defenses to a "final" judgment. (PUC endorsement, App. I at p. 56a.) As a matter of constitutional law, that expectation was not justified.[20]

A default "prove-up" either by affidavits submitted to a court clerk, or an uncontested hearing before a judge, in the absence of *actual notice* to Condor is no substitute for the insurer's right to an adversarial contest of the issues. As this Court has said, such "one-sided, self-serving, and conclusory submissions" cannot be employed to obtain even a temporary deprivation of property *before* a determination of the merits. *Connecticut v. Doehr,* 501 U.S. at 10-11 (ex parte attachment proceedings); see also *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 at 606-608 (Georgia pre-judgment garnishment procedures held to violate Due Process Clause). Here, imposing a default judgment totaling more than $225,000 upon a motor carrier liability insurer where there has been no opportunity to contest the merits of the plaintiffs' claims at any stage of the underlying action, or in the subsequent garnishment proceedings on Condor's policy, is a *permanent* deprivation of property rights amounting to a forfeiture.

Contrary to Eriksen's position, neither *Home Indemnity v. King* nor the PUC endorsement can be read as a waiver of these fundamental rights. *Insurance Code* §11580 generally provides that in a post-judgment action brought by a judgment creditor of its insured, the insurer may defend the garnishment action "subject to the terms and limitations [of

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[20] *Pruyn v. Agricultural Ins. Co.,* 36 Cal.App.4th 500, 526, 42 Cal.Rptr. 2d 295, 311 (1995) (procedural due process requires that a "non-party insurer must be given a fair opportunity to litigate" stipulated or uncontested damage awards).

the policy]." Cal. Ins. Code §11580(b)(2) (App. K at p. 82a). *Home Indemnity* established an exception to the general rule that a insurer may raise contractual defenses, based upon the regulated policy language for motor carrier liability insurers. *Home Indemnity's* interpretation of former PUC General Order No. 100, and the mandatory language of the endorsement attaching to Condor's policy, merely stands for the proposition that the insurer is precluded from asserting insurance policy-based defenses — such as the insured's breach of the notice and cooperation clauses — in response to a third party's otherwise valid, and "final," liability judgment. *Home Indemnity*, 34 Cal.3d at 814-815, 670 P.2d at 347-348.

Home Indemnity did not eliminate the liability insurer's right to contest a judgment constitutionally void having been procured in violation of due process, *including* a judgment obtained by extrinsic fraud or mistake. *Home Indemnity*, 34 Cal.3d at 815-816, 670 P.2d at 347-348.[21] The California Supreme Court reasoned that an insurer's exclusive remedy where the policyholder failed to provide timely notice of the action was to sue the policyholder for breach of contract. *Ibid*; see also *Transamerica Ins. Co. v. Tab Transportation, Inc.*, 12 Cal.4th at 401-404, 906 P.2d at 1348-1350 (where policy was validly cancelled as between insurer and trucking company, but proper notice was not filed with the PUC, insurer was liable on the judgment with the "right of reimbursement" from the insured). Notwithstanding this contractual remedy, the language of the PUC endorsement

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[21] To the extent *Home Indemnity* can be read to the contrary, its holding would violate due process: "Although an insurer generally is not bound by a judgment unless it had notice of the pendency of the action . . ., that is not true where the specific provisions of the PUC endorsement obligate the insurer to pay a judgment against the insured *regardless of whether the insured had complied with all conditions of the policy, such as notice.*" *Home Indemnity*, 34 Cal.3d at 815, 670 P.2d at 348 (emphasis added).

cannot be applied to abrogate Condor's independent constitutional rights.[22]

Condor's due process rights to notice and the opportunity to contest the validity of *Eriksen's claims* exist separate and apart from any contractual right to notice under the policy. Indeed, *Home Indemnity* relied upon a prior decision interpreting the same PUC endorsement in *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 636 P.2d 32 (1981). As *Samson* recognized, even in light of the PUC endorsement precluding *contractual* challenges to a "final" judgment: "The 'general rule' [is] that an insurer *is not bound by a judgment unless it had notice of the pendency of the action. . . .*" *Samson*, 30 Cal.3d at 238, 636 P.2d at 43, *citing Clemmer v. Hartford Ins. Co.*, 22 Cal.3d at 884, 587 P.2d at 1108 (emphasis added).

Under the endorsement, Condor only agreed that *contractual* defenses based upon the insured's breach of the terms and conditions of coverage would not be asserted in defense of a "final judgment." Condor *has not* denied coverage. Rather, it has remained ready and willing to address the liability and damage questions presented by Eriksen's claim *on the merits* — as is its constitutional entitlement under the Due Process Clause.[23]

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[22]"[A] waiver of constitutional rights in any context must, at the very least be clear. We need not concern ourselves with the involuntariness or unintelligence of waiver when the contractual language relied upon does not, on its face, even amount to waiver." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); see also *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 185-186 (1972) (waiver of due process rights must be voluntary, knowingly and intelligently made with appreciation of legal consequences).

[23]This "constitutional calculus" did not factor into *Home Indemnity's* analysis of the PUC's regulatory scheme. *Greenup*, 42 Cal.3d at 829, 726 P.2d at 1299. It is squarely presented by the facts of this case.

B. Certiorari Should Be Granted To Clarify That Due Process Requires Prior Notice, And The Opportunity For An Adversarial Contest On The Merits, Before The Policy Of A Motor Carrier Liability Insurer May Be Bound By A Default Judgment Against Its Insured

At a minimum, Condor was entitled to notice and the opportunity to defend the prior action on the merits before the default judgment could be binding on its policy. The contrary conclusion reached by the California courts in this case has disturbing and far-reaching implications. At least 35 states and the Interstate Commerce Commission similarly require that broadening-endorsements be attached to motor carrier liability insurance policies, and that such policies be filed with the regulatory agency, precluding the assertion of *contractual* defenses as against members of the general public.[24]

Condor's PUC certificate number appeared in the investigating officer's report of the September 6, 1989 accident involving the Quality Rock dump truck driven by Schuler. (Police report, "Party 2 — Insurance Carrier," App. J at p. 70a.) In the regulated setting of motor carrier liability insurance, the identity of the contracting insurance company can be readily ascertained, and demands are often made directly upon the insurer by an injured motorist (or her legal counsel) before suit is ever filed.[25]

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[24] See generally App. K at pp. 88a-90a (ICC regulations); App. L at p. 91a et seq. (National Survey of Insurance Regulations); see also *Harco National Ins. Co. v. Bobac Trucking, Inc.*, 107 F.3d 733, 736 (9th Cir. 1997) (discussing operation of ICC endorsement).

[25] Direct communications by personal injury claimants (and their counsel) with motor vehicle liability insurers are so prevalent, even before suit is filed, that over 40 states have adopted uniform insurance regulations for claims handling practices once the insurer receives a "notice of claim." See Cal. Ins. Code, §§790.03, 790.10; 10 Cal. Code of Regs., §§2695.1-2695.14, esp. §2695.8 (automobile insurance);

Requiring Eriksen to first provide Condor with notice, and a full and fair opportunity to litigate the issues arising from the September 6, 1989 accident, works no particular hardship on her. As one of the five accidents she contended "caused" whatever injuries or damages she may have sustained, presumably, she was prepared to prove that claim against Quality Rock during the four-year period after the accident before she sought to levy and execute upon her default judgment. Of course, Condor was not a party, and as such did not receive notice until post-judgment enforcement proceedings were already underway.

The facts of this case well illustrate the unfair and incongruous results produced by Eriksen's overly broad reading of the PUC endorsement language. Caught between the regulatory Sylla of the PUC's mandatory policy language, and the procedural Charybdis precluding direct attack on default judgments more than six months after entry, Condor was deprived of any opportunity to test the merits of Eriksen's underlying action.[26]

Due process requires more than an interpretation that state or federal insurance regulations may compel the carrier to "pay the judgment" — without first receiving notice of the liability action, without the opportunity to defend under its policy or to contest the merits of the plaintiff's claims when joined in an action to enforce a default judgment by garnishing its policy. Fundamental fairness dictates that

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W. CROSKEY, M. KAUFMAN, ET AL., CAL. PRAC. GUIDE: INS. LITIGATION, ¶¶14:37-14:64, pp. 14-19 (Rutter Group 1997); *Moradi-Shalal,* 46 Cal 3d at 299, 758 P.2d at 63 (adoption of NAIC regulations in 48 states).

[26]The choices offered were no better for Condor's insured, Quality Rock. Faced with the prospect of paying a substantial default judgment of questionable validity, or being required to reimburse Condor under the terms of the PUC endorsement if Condor was required to pay under its policy, Quality Rock declared bankruptcy and went out of business. (Jones decl. ¶9, App. J at p. 66a.)

notice be provided to a regulated motor carrier liability insurer in the position of Condor within a reasonable time after the commencement of a liability claim sufficient to enable the insurer to undertake the defense and to litigate the merits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
GREGORY F. STANNARD
2450 BROADWAY, SUITE 550
SANTA MONICA, CA 90404-3064
(310) 315-6366

LARRY A. ROTHSTEIN
21700 OXNARD STREET,
SUITE 960
WOODLAND HILLS, CA
91367-3642
(818) 716-2662

HARRY W.R. CHAMBERLAIN II
Counsel of Record
MARTHA A. SHEN
GINSBURG, STEPHAN,
ORINGHER & RICHMAN, P.C.
10100 Santa Monica Blvd.,
8th Floor
Los Angeles, CA 90067-4012
(310) 557-2009

Attorneys for Petitioner
Condor Insurance Company

APPENDIX A — ORDER OF CALIFORNIA SUPREME COURT, FILED MARCH 18, 1998, ERIKSEN V. CONDOR INSURANCE COMPANY, No. S067653

**SECOND APPELLATE DISTRICT,
DIVISION SEVEN, NO. B109749
S067653**

IN THE SUPREME COURT OF CALIFORNIA

LISA CHRISTINE ERIKSEN,

Respondent.

v.

CONDOR INSURANCE COMPANY,

Appellant.

**SUPREME COURT
FILED
MAR 18 1998
ROBERT WANDRUFF CLERK
DEPUTY**

Appellant's petition for review DENIED.

GEORGE

Chief Justice

APPENDIX B — DECISION OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN, FILED DECEMBER 23, 1997, ERIKSEN V. CONDOR INSURANCE COMPANY, 2ND CIVIL No. B109749

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SEVEN

LISA CHRISTINE ERIKSEN,

Plaintiff and Respondent.

v.

CONDOR INSURANCE COMPANY,

Defendant and Appellant.

B109749
(SUPER. CT. NO. BC109937)
COURT OF APPEAL — SECOND DIST.
FILED
DEC 23 1997
JOSEPH A. LANE, CLERK

Appeal from a judgment of the Superior Court of Los Angeles County. Aurelio Munoz, Judge. Affirmed.

Gregory F. Stannard and Peter J. King for Defendant and Appellant.

Steven G. Cohn for Plaintiff and Respondent.

Appendix B

PROCEDURAL AND FACTUAL BACKGROUND

The facts are undisputed.[1] On November 22, 1989, in Los Angeles County Superior Court Case No. NWC053623, respondent filed a complaint for damages suffered in five separate and unrelated automobile accidents in 1988 and 1989. In it, she alleged that appellant's insured, Quality Rock Company, Inc., and its employee, William Joseph Schuler, negligently caused an accident on September 6, 1989 in Los Angeles County. Respondent checked the box on the form complaint indicating general damages and all the boxes indicating special damages: wage loss, hospital and medical expenses, property damage, loss of use of property, and loss of earning capacity. No amount was stated, but a statement of damages pursuant to Code of Civil Procedure section 425.11 was served with the complaint. The statement of damages claimed general damages in the

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[1]Most of the papers in the appendix are not conformed or date-stamped, and contain no other indicia that they were filed in the superior court as required by California Rules of Court, rule 5.1(c)(1). However, since respondent has not objected to the form of the papers in the appendix, we accept appellant's implied representation that the documents are true and correct copies of papers in the superior court file. (See Cal. Rules of Court, rule 5.1(i)(l).)

Appellant is not alone in ignoring the rules. Respondent managed to bring her brief in under the maximum allowed by rule 15(e) only by ignoring the type-size and margin requirements, making the brief onerously difficult to read. (See Cal. Rules of Court, rule 15(d).) After we gave respondent the opportunity to file a conforming brief, she enlarged the type face, but packed her brief with additional and longer lines, and retained the one-inch margins, in violation of rule 15, subdivisions(d)(2) and (d)(3). In any event, since we have disagreed with appellant's points, we have chosen not to order respondent's brief stricken, so that no delay will be occasioned by her disregard for the rules of court. However, we express our disapproval.

amount of $750,000, medical and incidental expenses according to proof, amounting to $8,279 as of the date of the statement, and for loss of earnings according to proof, approximately $1,037 at the time of the statement.

Quality Rock was served with the summons, complaint, and statement of damages by substituted service on June 20, 1991. Schuler and the unrelated defendants were served by publication in December, 1991. The defaults of Schuler, Quality Rock, and an unrelated defendant, Deborah Majick, were taken on March 13, 1992. More than a year later, on March 22, 1993, judgment was entered against Quality Rock and Schuler in the sum of $228,500. Of that sum, $220,000 were awarded as general damages, and $8,500 as special damages.[2]

Thereafter, respondent filed an action in Superior Court Case No. BC109937, to compel appellant to pay her judgment against Schuler and Quality Rock pursuant to Insurance Code section 11580, and to recover damages under several theories, including breach of the duty of good faith and fair dealing.[3] Appellant answered the first amended

---

[2] Apparently, both Quality Rock and Schuler failed to notify the insurance carrier of the claim and the judgment. Appellant explains that a rider in the policy precluded a defense to respondent's action based upon such failure, in the absence of fraud or collusion.

[3] Insurance Code section 11580 provides in pertinent part: "... Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered: [¶] (1) Against loss or damage resulting from liability for injury suffered by another person .... (2) Against loss of or damage to property caused by ... any vehicle, and for which the insured is liable .... [¶] (b) Such policy shall not be thus issued or delivered to any person in this state unless is contains all the following provisions: ... [¶] (2) A provision that whenever judgment is secured against the insured ... in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on

complaint, and filed a cross-complaint against respondent in or about December, 1994. On September 29, 1995, appellant filed a motion to vacate the judgment entered against its insureds in Superior Court Case No. NWC053623, together with a motion for summary judgment or summary adjudication. At approximately the same time, respondent filed her own motion for summary judgment or summary adjudication.

On October 10, 1996, at a mandatory settlement conference, the parties entered into a partial settlement whereby respondent agreed to dismiss her second, third, fourth, fifth, and sixth causes of action, and appellant agreed to dismiss its cross-complaint, leaving only respondent's first cause of action for payment of the default judgment and appellant's motion to vacate. The trial court denied the motion to vacate, and adjudicated appellant's motion to vacate. The trial court denied the motion to vacate, and adjudicated the first cause of action in favor of respondent. Judgment was entered on December 19, 1996 in favor of respondent in the amount of $228,500, plus interest from March 22, 1993. Appellant then filed a timely notice of appeal.

DISCUSSION

Appellant contends that the default judgment against its insureds was void, subject to attack at any time without regard to the time limits of Code of Civil Procedure section 473, subdivision (b).

Since the action against Schuler and Quality Rock was a personal injury action, respondent was unable to allege the amount of damages in her complaint against them. (See

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the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

Code Civ. Proc., § 425.10.) Before obtaining a default judgment, she was required to serve a statement of damages on the defendants. (See Code Civ. Proc., § 425.11.) Any judgment taken in such cases without the prior service of a statement of damages is void. (*Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 760.) In default judgments, the demand sets a ceiling on recovery, and any recovery over the amount of the demand is void. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826-827.)

Respondent served her statement of damages on appellant along with the complaint, and appellant does not contend otherwise. Nevertheless, appellant contends that the judgment was void because respondent's statement of damages was so vague and misleading that it did not meet the minimum requirements of due process. The statement of damages was vague and ambiguous, appellant argues, because it claimed a total of $750,000 in general damages and $9,316 in special damages, without specifying what part of those amounts she claimed from each of the defendants. Thus, each defendant could not have determined from the statement of damages how much of the claimed damages respondent sought from just that defendant. Under appellant's theory, due process is not served unless the statement of damages precisely details not only the maximum amount sought, but how much of the total damages is sought from each defendant.

To support its theory, appellant cites authority interpreting the former language of section 425.11. (See e.g. *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428,435.) Before the 1993 amendment, section 425.11 read: "If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general

damages sought to be recovered (1) before a default may be taken . . . ." The 1993 amendment eliminated the reference to "special and general damages," and now simply refers to the nature and amount of damages. "However, given the significance of the distinction between special and general damages, the 'nature' of the damages being sought should include whether they are special or general." (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 132, p. 548.)

Appellant has provided no authority, and we have found none, which requires any more specificity in a statement of damages than a breakdown in terms of the type of damages sought, and a statement of a dollar amount (as opposed to a demand "according to proof"). (See e.g. *Parish v. Peters* (1991) 1 Cal.App.4th 202, 215-217.) A section 425.11 statement of damages simply replaces the specification of damages which is generally required to be made in the complaint. (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 38.) It is the functional equivalent of an amendment to the complaint to add the prayer which section 425.10 prohibits in the body of the complaint. (*Plotitsa v. Superior Court, supra,* 140 Cal.App.3d at p. 759.)

A prayer is not an essential part of the complaint, and relief may be given even upon a defective or missing prayer (see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 456, pp. 553-554), although such relief may not exceed the amount demanded in the complaint or in a statement of damages. (Code Civ. Proc., § 580.) A pleading must be liberally construed, with a view to substantial justice between the parties. (Code Civ. Proc., § 452.) Liberally construing respondent's statement of damages, we find it provided appellant's insureds with notice that a default

could result in a judgment of up to $750,000 in general damages and $9,316 in special damages. It was enough information to advise them of the great risk they were taking in not filing an answer. Since respondent recovered less than those amounts, the judgment was not void.

Appellant contends that notice was negated because any recipient of the statement of damages could reasonably assume that the general damages were grossly inflated and much of what was demanded would be sought from the unrelated defendants. We need not decide whether such an assumption would negate notice, since we reject appellant's assertion that it would be a reasonable assumption. A defaulting defendant would be foolish not to inquire further in the face of such a large demand.[4]

Schuler and Quality Rock were served with a statement of damages which gave them sufficient notice of the maximum amounts of general and special damages which respondent claimed from them. Due process did not require a specific breakdown among the defendants. The default judgment was not void on its face, and appellant was required to comply with the time limits set forth in Code of Civil Procedure section 473, subdivision (b). Since appellant did not so comply, its motion to vacate was properly denied.

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[4] Since we reject appellant's contention that the statement of damages is constitutionally inadequate, we do not reach its contention that its inadequacy is not made harmless by the reasoning of *Candelaria v. Avitia* (1990) 219 Cal.App.3d 1436. There, service of a statement of damages was excused were the defendant had been served by publication, and his whereabouts were unknown. (219 Cal.App.3d at p. 1441.) Section 425.11 has since been amended to require service of the statement on absent defendants in the same manner as the complaint. (See Code Civ. Proc., § 425.11, subd. (d) (1).)

Appendix B

DISPOSITION

The judgment is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LILLIE, P.J.

We concur:

JOHNSON, J.

WOODS, J.

APPENDIX C — NOTICE OF ENTRY OF JUDGMENT AND JUDGMENT OF THE LOS ANGELES COUNTY SUPERIOR COURT ENTERED DECEMBER 19, 1996, ERIKSEN V. CONDOR INSURANCE COMPANY, LOS ANGELES COUNTY SUPERIOR COURT, Case No. BC109937

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

No. BC109937

NOTICE OF ENTRY OF JUDGMENT

LISA CHRISTINE ERICKSEN,

Plaintiff(s),

vs.

CONDOR INSURANCE COMPANY, ET. AL.

Defendant(s).

To the parties herein and to their attorneys of record, You are hereby notified that:

Judgment in the above-entitled action was entered on December 19, 1996.

Appendix C

CERTIFICATE OF MAILING

I, JOHN A. CLARKE, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles, and not a party to the within action, hereby certify that on December 26, 1996, I served the above Notice of Entry of Judgment, on the parties in the within action, by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office mail box in the County of Los Angeles, California, addressed as follows:

Steven G. Cohn
4333 Park Terrance Drive Suite 200
Westlake Village, CA 91361

Gregory F. Stannard
2450 Broadway Suite 550
Santa Monica, CA 90404

JOHN A. CLARKE,
Executive Officer/Clerk
of the Superior Court

By: RUBY R. MAYA Deputy
RUBY R. MAYA

Appendix C

Steven G. Cohn, Esq.
State Bar Number 133439
LAW OFFICES OF STEVEN G. COHN
4333 Park Terrace Drive
Suite 200
Westlake Village, California 91361
(818) 735-0800

Attorneys for Plaintiff,
LISA CHRISTINE ERIKSEN

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LISA CHRISTINE ERIKSEN,

Plaintiff(s),

vs.

CONDOR INSURANCE COMPANY, a California corporation; and Does 1 through 180, Inclusive,

Defendant(s).

Case No. BC109937

JUDGMENT

MOTION CUT-OFF: NONE
DISCOVERY CUT-OFF: NONE
TRIAL DATE: NONE

The motion for Defendant and Cross-Complainant, CONDOR INSURANCE COMPANY ("CONDOR"), to vacate judgment as void on its fact, or in the alternative

for summary judgment, or in the alternative for summary adjudication of issues, and the motion of Plaintiff, LISA CHRISTINE ERIKSEN ("ERIKSEN"), for summary judgment, or in the alternative for summary adjudication (The "Concurrent Motions"), came on regularly for hearing on October 27, 1996, in Department 47 of the above-entitled court, the Honorable Aurelio Munoz presiding. Appearing as attorney for ERIKSEN was the Law Offices of Steven G. Cohn by Steven G. Cohn.

After full consideration of the evidence, the separate statements of each party, and the points and authorities submitted by counsel, as well as counsel's oral arguments, the court issued a minute order regarding The Concurrent Motions which stated:

> "The motion to set aside the judgment in case number NWC 053623 is denied. Moving party has been on notice for over two years that there was an automobile accident and for over a year that there was a default judgment entered against its insured. The arguments it now makes to set aside that judgment are without merit.
>
> Plaintiff's motion for summary adjudication of issues as to the cross-compliant in case number BC 109937 is granted to the 1st and 5th causes of action. Cross-complainant has failed to show the existence of any fraud or mistake in its underlying case. As to the 5th cause of action, since there has been no showing of extrinsic fraud or mistake, the defendant insurance company is liable on the judgment." *Home Indemnity Co. v. King* (1983) 34 Cal.3d 803.

On October 10, 1996, CONDOR and ERIKSEN appeared before the Honorable Aurelio Munoz in Department 47 of the above entitled court for a mandatory settlement conference. CONDOR was represented by

Gregory F. Stannard, and ERIKSEN was represented by Steven G. Cohn. At the mandatory settlement conference, the parties agreed to settle this action. The settlement was put on the record in Department 47 of this court. The settlement is also memorialized by a release and settlement agreement between the parties. Pursuant to the settlement, ERIKSEN has agreed to dismiss the second, third, fourth, fifth and sixth causes of action of ERIKSEN's First Amended Complaint in this action with prejudice, and CONDOR has agreed to dismiss all of the causes of action of its Cross-Complaint in this action with prejudice. A signed request for dismissal has been filed to accomplish the dismissals.

The First Cause of Action of Eriksen's First Amended Complaint for Damages from Insurer's Refusal to Pay Final Judgment against insured is, therefore, the only matter that remains to be adjudicated in this action. Pursuant to this Court's previous ruling on The Concurrent Motions, this Court now rules that ERIKSEN is entitled to a judgment against CONDOR on the First Cause of Action of ERIKSEN's First Amended Complaint in this action. That judgment shall include the amount of the judgment in Case Number NWC 053623, plus interest on that amount from March 22, 1993. However, pursuant to the settlement agreement, said judgment shall not include costs or attorney's fees.

NOW, THEREFORE, IT IS ORDERED, ADJUDICATED AND DECREED:

That plaintiff and cross-defendant, LISA CHRISTINE ERIKSEN, pursuant to the first cause of the action from her First Amended Complaint in this action have judgment against defendant and cross-complainant, CONDOR INSURANCE COMPANY, in the sum of $228,500.00 plus

interest at the rate of ten percent (10%) per annum from March 22, 1993 on said sum.

Dated: 12/19/96

/s/ AURELIO MUNOZ

THE HONORABLE
AURELIO MUNOZ, JUDGE
Los Angeles County Superior Court

APPROVED AS TO FORM:

DATED: 12/18/96

LAW OFFICES OF STEVEN G. COHN
By: /s/ STEVEN G. COHN

STEVEN G. COHN, ESQ
Attorney for Plaintiff/Cross-Defendant,
LISA CHRISTINE ERIKSEN

DATED: 12/18/96

LAW OFFICES OF GREGORY F. STANNARD
By: /s/ GREGORY F. STANNARD

GREGORY F. STANNARD, ESQ.
Attorney for Defendant/Cross-Complainant,
CONDOR INSURANCE COMPANY

APPENDIX D — NOTICE OF APPEAL FILED FEBRUARY 5, 1997, ERIKSEN V. CONDOR INSURANCE COMPANY, LOS ANGELES COUNTY SUPERIOR COURT Case No. BC109937

GREGORY F. STANNARD, Bar #108674
LAW OFFICES OF GREGORY F. STANNARD
2450 Broadway, Suite 550
Santa Monica, California 90404-3064
Telephone: (310) 315-6366

Attorneys for Defendant and Cross-Complainant, CONDOR INSURANCE COMPANY

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LISA CHRISTINE ERIKSEN,

Plaintiff,

vs.

CONDOR INSURANCE COMPANY, et al.,

Defendants.

AND ALL RELATED ACTIONS

Case No.: BC109937
(Case assigned to Hon. Aurelio Munoz, Dept. No. 47)

NOTICE OF APPEAL

Appendix D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that defendant, Condor Insurance Company, will appeal the Order of this Court, dated December 19, 1996, awarding plaintiff, Lisa Christine Eriksen, damages against defendant, Condor Insurance Company, pursuant to plaintiff's first cause of action from her First Amended Complaint in this action.

By: /s/ PETER J. KING
(For) GREGORY F. STANNARD
Attorney for Defendant and
Cross-Complainant,
CONDOR INSURANCE COMPANY

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed by the Law Offices of Gregory F. Standard in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2450 Broadway, Suite 550, Santa Monica, California 90404-3064.

In the course of my employment with the Law Offices of Gregory F. Standard, I have, through firsthand personal observation, become readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On February 5, 1997, I placed a copy of the attached document entitled: NOTICE OF APPEAL, in an envelope addressed as set forth on the attached proof of service list. I then sealed that envelope, affixing the appropriate postage thereon, and placed the envelope in an out-box for collection by personnel of Barrister Executive Suites and for ultimate

posting and placement in the United States mail later that same day. If the customary business practices of the Barrister Executive Suites regarding collection and processing of correspondence and mailing were followed, and I am confident that they were, that envelope was placed in the United States mail at Santa Monica, California that same day.

Executed on February 5, 1997, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ ARLENE PLAPINGER
ARLENE PLAPINGER

CASE NAME:	Lisa Christine Eriksen v Condor Insurance Company, et al.
CASE NO.:	BC 109937 (Case assigned to Hon. Aurelio Munoz, Dept. 47)
COURT:	LOS ANGELES SUPERIOR COURT

Steven G. Cohn, Esq.
4333 Park Terrace Dr., #200
Westlake Village, CA 91361
818-735-0800;
Fax: 818-597-7760

Plaintiff
LISA CHRISTINE
ERIKSEN

APPENDIX E — ORDER RE MOTION OF DEFENDANT AND CROSS-COMPLAINANT CONDOR TO VACATE JUDGMENT AS VOID ON ITS FACE, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION OF ISSUES; ORDER ON PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES, MINUTES OF THE LOS ANGELES COUNTY SUPERIOR COURT FILED OCTOBER 27, 1995, ERIKSEN V. CONDOR INSURANCE COMPANY, LOS ANGELES COUNTY SUPERIOR COURT Case No. BC109937

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 10/27/95

HONORABLE AURELIO MUÑOZ
JUDGE

HONORABLE JUDGE PRO TEM #1

N. HAMPTON, C.A. Deputy Sheriff

DEPT. 47

R. MAYA DEPUTY CLERK

ELECTRONIC RECORDING MONITOR

NONE Reporter

8:30 am

BC109937

LISA CHRISTINE ERIKSEN

VS

CONDOR INSURANCE COMPANY, ET AL

STEVEN G. COHN [x]
Plaintiff Counsel

PETER J. KING [x]

GREGORY F. STANNARD [x]
Defendant Counsel

Appendix E

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT AND CROSS-COMPLAINANT, CONDOR INSURANCE CO., TO VACATE JUDGMENT AS VOID ON ITS FACE; OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION OF ISSUES; REQUEST FOR JUDICIAL NOTICE

FURTHER STATUS CONFERENCE

The motion to set aside the judgment in case number NWC 053623 is denied. Moving party has been on notice for over two years that there was an automobile accident and for over a year that there was a default judgment entered against its insured. The arguments it now makes to set aside that judgment are without merit.

Plaintiff's motion for summary adjudication of issues as to the cross-complaint in case number BC 109937 is granted as to the 1st and 5th causes of action. Cross-complainant has failed to show the existence of any fraud or mistake in the underlying case. As to the 5th cause of action, since there has been no showing of extrinsic fraud or mistake, the defendant insurance company is liable on the judgment. HOME INDEMNITY CO. V. KING (1983) 34 C3d 803.

Further Status Conference is held. Court and counsel confer.

A ____ Further ____ Status Conference is set 01/16/96 at 8:30 a.m. in Department 47.

PAGE 1 DEPT. 47

Appendix E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 10/27/95
HONORABLE AURELLO MUNOZ
JUDGE

HONORABLE JUDGE PRO TEM #1
N. HAMPTON, C.A. Deputy Sheriff

DEPT 47
R. MAYA DEPUTY CLERK

ELECTRONIC RECORDING MONITOR
NONE Reporter

8:30 am

BC109937

LISA CHRISTINE ERIKSEN

vs.

CONDOR INSURANCE COMPANY, ET AL

STEVEN G. COHN [x]
Plaintiff Counsel

PETER J. KING [x]
GREGORY F. STANNARD [x]
Defendant Counsel

NATURE OF PROCEEDINGS:

Notice is [ ] Waived [X] To be given by counsel for plaintiff.

Appendix E

A copy of this minute order is sent this date via U.S Mail to the following:

Steven G. Cohn
4333 Park Terrace Drive
Suite 200
Westlake Village, CA 91361

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE, AND CORRECGT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

ATTEST November 17, 1995
JOHN A. CLARKE

Executive Officer Clerk of the Superior
Court of California, County of Los Angeles.

By /s/ S. OCHOA, Deputy
S. OCHOA

PAGE 2 DEPT. 47

APPENDIX F — ORDER DENYING DEFENDANT CONDOR'S PETITION FOR WRIT OF MANDATE, FILED DECEMBER 14, 1995, CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN SECOND CIVIL No. B097952

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLANT DISTRICT

DIVISION SEVEN

CONDOR INSURANCE COMPANY,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

LISA CHRISTINE ERIKSEN,

Real Party in Interest.

No. B097952

(Super. Ct. No. BC109937)

(Aurelio Munoz, Judge)

ORDER

COURT OF APPEAL — SECOND DIST.

FILED

DEC. 14 1995

JOSEPH A. LANE, Clerk

J. GUZMAN, Deputy

Appendix F

THE COURT*:

The court has read and considered the petition for writ of mandate filed herein December 12, 1995. The petition is denied.

/s/ LILLIE, P.J.
LILLIE, P.J.

/s/ JOHNSON, J.
JOHNSON, J.

/s/ WOODS (FRED) J.
WOODS (Fred), J.

APPENDIX G — ORDER OF CALIFORNIA SUPREME COURT DENYING DEFENDANT CONDOR'S PETITION FOR REVIEW FILED JANUARY 23, 1996, No. S050791

**SECOND APPELLATE DISTRICT,
DIVISION SEVEN,**

No. B097952

S050791

IN THE SUPREME COURT OF CALIFORNIA

CONDOR INSURANCE COMPANY,

Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,

Respondent

LISA CHRISTINE ERIKSEN,

Real Party In Interest

**SUPREME COURT
FILED**

JANUARY 23, 1996
Robert Wandruff Clerk
DEPUTY

Petition for review DENIED.

LUCAS
Chief Justice

Appendix H

APPENDIX H — NOTICE OF MOTION AND MOTION TO VACATE THE JUDGMENT (IN LISA CHRISTINE ERIKSEN V. WILLIAM JOSEPH SCHULER, LOS ANGELES COUNTY SUPERIOR COURT Case No. NWC053623) AS VOID ON ITS FACE, AND DECLARATION OF GREGORY F. STANNARD AND CERTAIN EXHIBITS THERETO, FILED SEPTEMBER 29, 1995, ERIKSEN V. CONDOR INSURANCE COMPANY, LOS ANGELES COUNTY SUPERIOR COURT Case No. BC109937 (excerpted)

Appendix H

GREGORY F. STAMKARD, Bar #108674
LAW OFFICES OF GREGORY F. STAMKARD
2450 Broadway, Suite 850
Santa Monica, California 90404-3064
Telephone: (310) 315-6366

Attorneys for Defendant and Cross-Complainant,
CONDOR INSURANCE COMPANY

SEP 28 1995
LOS ANGELES SUPERIOR COURT

SEP 28 11

LOS ANGELES SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LISA CHRISTINE ERIKSEN, Plaintiff, vs. CONDOR INSURANCE COMPANY, et al., Defendants. AND ALL RELATED ACTIONS.	Case No.: BC109937 (Case assigned to Hon. Aurelio Munoz, Dept. No. 47) NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT AS VOID ON ITS FACE; OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION OF ISSUES; REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF GREGORY F. STAMKARD *[FILED CONCURRENTLY WITH SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS]* Date: October 27, 1995 Time: 8:30 a.m. Dept.: 47 Motion Cutoff: None Discovery C/O: None Trial Date: None

TO PLAINTIFF, LISA CHRISTINE ERIKSEN, AND TO HER ATTORNEYS OF

Appendix H

of damages that inadequately notified the underlying defendants (Schuler and Quality Rock) of the damages sought by the underlying plaintiff, making the entry of a default judgment a denial of those defendants' due process rights. These motions are also based upon the attached Memorandum of Points and Authorities, the attached Declaration of Gregory F. Stannard, the Separate Statement of Undisputed Material Facts filed concurrently herewith, all pleadings, records and papers on file herein, and upon such other and further argument or evidence that the court may consider at the time of the hearing on these motions.

These motions are also made in accordance with the instruction by the court at the status conference in this case on August 31, 1995, that the parties file motions on this issue by September 29, 1995, and that said motions would be set to be heard on October 27, 1995, in Department "47" of the above-entitled court.

Dated: Oct 24, 1995 LAW OFFICES OF GREGORY F. STANNARD

By _____
GREGORY F. STANNARD
Attorney for Defendant and
Cross-Complainant,
CONDOR INSURANCE COMPANY

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DECLARATION OF GREGORY F. STANNARD

I, Gregory F. Stannard, declare:

I am an attorney at law, duly admitted to practice in the courts of the State of California, and I am the attorney of record for defendant and cross-complainant, Condor Insurance Company (hereinafter, "Condor").

I am submitting this declaration in support of Condor's motion to vacate judgment as void on its face, or in the alternative for summary judgment, or in the alternative for summary adjudication of issues.

Attached hereto as Exhibit "A," is a true and correct copy of plaintiff's complaint, filed on November 22, 1989, in Lisa Christine Eriksen v. William Joseph Schuler, et al., Los Angeles County Superior Court, Case No. NWC053623 (hereinafter, the "underlying action").

Attached hereto as Exhibit "B," is a true and correct copy of plaintiff's Statement of Damages in the underlying action, dated June 18, 1991.

Attached hereto as Exhibit "C," is a true and correct copy of the Proof of Publication in the underlying action, filed on December 27, 1991.

Attached hereto as Exhibit "D," is a true and correct copy of plaintiff's Request for Entry of Default in the underlying action, dated March 4, 1992.

Attached hereto as Exhibit "E," is a true and correct copy of the Default Judgment by the court in the underlying action, filed on March 22, 1993.

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RECORD:

YOU ARE HEREBY NOTIFIED that on October 27, 1995, at 8:30 A.M., or as soon thereafter as counsel can be heard, in Department 47 of the above-entitled court, located at 111 N. Hill Street, Los Angeles, California, defendant and cross-complainant, Condor Insurance Company (hereinafter, "Condor"), will and hereby does and move the court for an order vacating the default judgment entered on or about March 22, 1993, against William Joseph Schuler and Quality Rock Company, Inc., in Lisa Christine Eriksen v. William Joseph Schuler, et al., Los Angeles County Superior Court, Case No. NWC053623, which judgment is the basis of plaintiff's present action to enforce said judgment under California Insurance Code, Section 11580, and other related causes of action; or, in the alternative, for summary judgment, as to plaintiff's First Amended Complaint, pursuant to California Code of Civil Procedure, Section 437c; or, in the alternative, for summary adjudication of issues pursuant to California Code of Civil Procedure, Section 437c(f), that:

"1. The default judgment entered on or about March 22, 1993, against William Joseph Schuler and Quality Rock Company, Inc., in Lisa Christine Eriksen v. William Joseph Schuler, et al., Los Angeles County Superior Court, Case No. NWC053623, is void on its face."

These motions are made on the grounds that the above-described judgment is void on its face because it is based upon a statement

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If sworn as a witness, I could competently testify to all of the foregoing.

I declare, under the penalty of perjury of the laws of the State of California, that the foregoing is true and correct.

Executed on this 7th day of September, 1995, at Santa Monica, California.

GREGORY F. STANNARD

Appendix H

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS) TELEPHONE FOR COURT USE ONLY

L. M. SCHULNER, A LAW CORPORATION (805) 484-0453
360 Mobil Avenue, Suite 107
Camarillo, California 93010

ATTORNEY FOR (NAME) Plaintiff-Eriksen

Insert name of court, judicial district or branch court, if any, and post office and street address

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES-NORTHWEST JUDICIAL DIST.
6230 Sylmar Avenue
Van Nuys, California 91401

ORIGINAL FIL
NOV 2 2 1989
COUNTY CLERK

PLAINTIFF

LISA CHRISTINE ERIKSEN,

DEFENDANT

WILLIAM JOSEPH SCHULER, QUALITY ROCK COMPANY, INCORPORATED, JEFFREY KRULL, JEFFREY AHRENS, DEBORAH MAJICK, and
☐ DOES 1 TO 100 inclusive.

COMPLAINT—Personal Injury, Property Damage, Wrongful Death

☒ MOTOR VEHICLE ☐ OTHER (specify):
☒ Property Damage ☐ Wrongful Death
☒ Personal Injury ☐ Other Damages (specify):

CASE NUMBER

NWC 053623

1 This pleading, including attachments and exhibits, consists of the following number of pages: _____

2 a Each plaintiff named above is a competent adult
☐ Except plaintiff (name)
☐ a corporation qualified to do business in California
☐ an unincorporated entity (describe)
☐ a public entity (describe)
☐ a minor ☐ an adult
☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
☐ other (specify)
☐ other (specify)

☐ Except plaintiff (name)
☐ a corporation qualified to do business in California
☐ an unincorporated entity (describe)
☐ a public entity (describe)
☐ a minor ☐ an adult
☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
☐ other (specify)
☐ other (specify)

b ☐ Plaintiff (name)
is doing business under the fictitious name of (specify):

and has complied with the fictitious business name laws.

c ☐ Information about additional plaintiffs who are not competent adults is shown in Complaint Attachment 2c.

(Continued)

Adopted by the Judicial Council of California

COMPLAINT—Personal Injury, Property Damage,
EXHIBIT A

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PA-4

SHORT TITLE	CASE NUMBER
ERIKSEN v. SCHULER, et al.	

COMPLAINT—Personal Injury, Property Damage, Wrongful Death

3. a. Each defendant named above is a natural person
   ☒ Except defendant (name)
QUALITY ROCK COMPANY, INCORPORATED,

☐ a business organization, form unknown
☒ a corporation
☐ an unincorporated entity (describe)
☐ a public entity (describe)
☐ other (specify)

☐ Except defendant (name):

☐ a business organization, form unknown
☐ a corporation
☐ an unincorporated entity (describe)
☐ a public entity (describe)
☐ other (specify)

☐ Except defendant (name)

☐ a business organization, form unknown
☐ a corporation
☐ an unincorporated entity (describe)
☐ a public entity (describe)
☐ other (specify)

☐ Except defendant (name):

☐ a business organization, form unknown
☐ a corporation
☐ an unincorporated entity (describe)
☐ a public entity (describe)
☐ other (specify)

b. The true names and capacities of defendants sued as Does are unknown to plaintiff.

c. ☐ Information about additional defendants who are not natural persons is contained in Complaint—Attachment 3c.

d. ☐ Defendants who are joined pursuant to Code of Civil Procedure section 382 are (names):

4. ☐ Plaintiff is required to comply with a claims statute, and
   a. ☐ plaintiff has complied with applicable claims statutes, or
   b. ☐ plaintiff is excused from complying because (specify):

5. This court is the proper court because
   ☐ at least one defendant now resides in its jurisdictional area
   ☐ the principal place of business of a corporation or unincorporated association is in its jurisdictional area
   ☒ injury to person or damage to personal property occurred in its jurisdictional area
   ☐ other (specify):

6. ☐ The following paragraphs of this complaint are alleged on information and belief (specify paragraph numbers):

(Continued)

Appendix H

SHORT TITLE: ERIKSEN v. SCHULER, et al.,	CASE NUMBER:

COMPLAINT—Personal Injury, Property Damage, Wrongful Death (Continued) Page

7. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are ☐ listed in Complaint—Attachment 7 ☐ as follows:

8. Plaintiff has suffered and/or will suffer:
   - ☐ wage loss
   - ☐ hospital and medical expenses
   - ☐ property damage
   - ☐ other damage (specify):
   - ☑ loss of use of property
   - ☑ general damage
   - ☑ loss of earning capacity

9. Relief sought in this complaint is within the jurisdiction of this court.

10. PLAINTIFF PRAYS
For judgment for costs of suit, for such relief as is fair, just, and equitable, and for
   - ☒ compensatory damages
     - ☒ (Superior Court) according to proof
     - ☐ (Municipal and Justice Court) in the amount of $
   - ☐ other (specify):

11. The following causes of action are attached and the statements above apply to each (Each complaint must have one or more causes of action attached.)
   - ☑ Motor Vehicle
   - ☑ General Negligence
   - ☐ Intentional Tort
   - ☐ Products Liability
   - ☐ Premises Liability
   - ☐ Other (specify):

LAWRENCE H. SCHULNER
(Type or print name) (Signature of plaintiff or attorney)

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SHORT TITLE: ERIKSEN v. SCHULER, et al.	CASE NUMBER:

FIRST (number) CAUSE OF ACTION—Motor Vehicle Page 4

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff (name): LISA CHRISTINE ERIKSEN,

MV-1. Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred
on (date): September 6, 1989
at (place): Las Virgenes Road at the U.S. 101 Freeway, Agoura, Los Angeles County, California

MV-2. DEFENDANTS
a. ☒ The defendants who operated a motor vehicle are (names):
WILLIAM JOSEPH SCHULER,
☒ Does 1 to 100,
b. ☒ The defendants who employed the persons who operated a motor vehicle in the course of their employment are (names):
QUALITY ROCK COMPANY, INCORPORATED,
☒ Does 1 to 100,
c. ☒ The defendants who owned the motor vehicle which was operated with their permission are (names):
QUALITY ROCK COMPANY, INCORPORATED,
☒ Does 1 to 100,
d. ☐ The defendants who entrusted the motor vehicle are (names):
QUALITY ROCK COMPANY, INCORPORATED,
☒ Does 1 to 100,
e. ☒ The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were (names):
WILLIAM JOSEPH SCHULER,
☒ Does 1 to 100,
f. ☒ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
☐ stated in Attachment MV-2f ☒ as follows:
Defendants who negligently designed, manufactured, sold, tested, inspected, repaired, replaced, maintained,or performed any type of work on defendant's vehicle or any component parts thereof.
☒ Does 1 to 100,

Appendix H

SHORT TITLE: ERIKSEN v. SCHULER, et al.	CASE NUMBER

SECOND CAUSE OF ACTION—Motor Vehicle Page 5

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff (name): LISA CHRISTINE ERIKSEN,

MV-1. Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred
on (date): May 8, 1989
at (place): Thousand Oaks Boulevard, Westlake Village, California

MV-2. DEFENDANTS

a. ☐ The defendants who operated a motor vehicle are (names):
JEFFREY KRULL,
☒ Does 1 to 100,

b. ☐ The defendants who employed the persons who operated a motor vehicle in the course of their employment are (names):
☒ Does 1 to 100,

c. ☐ The defendants who owned the motor vehicle which was operated with their permission are (names):
JEFFREY KRULL,
☒ Does 1 to 100,

d. ☐ The defendants who entrusted the motor vehicle are (names):
☒ Does 1 to 100,

e. ☐ The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were (names):
☒ Does 1 to 100,

f. ☐ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
☐ listed in Attachment MV-2f ☐ as follows:
Defendants who negligently designed, manufactured, sold, tested, inspected, repaired, replaced, maintained or performed any type of work on defendant's vehicle or any component parts thereof.
☒ Does 1 to 100,

Appendix H

SHORT TITLE: ERIKSEN v. SCHULER, et al.	CASE NUMBER:

THIRD (number) **CAUSE OF ACTION—Motor Vehicle** Page 6

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff (name): LISA CHRISTINE ERIKSEN,

MV-1. Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred
on (date): December 8, 1988
at (place): Moorpark Road at the U.S. 101 Freeway, Thousand Oaks, California

MV-2. DEFENDANTS
a. ☒ The defendants who operated a motor vehicle are (names):
JEFFREY AHRENS,
☒ Does 1 to 100,
b. ☒ The defendants who employed the persons who operated a motor vehicle in the course of their employment are (names):
☒ Does 1 to 100,
c. ☒ The defendants who owned the motor vehicle which was operated with their permission are (names):
JEFFREY AHRENS,
☒ Does 1 to 100,
d. ☐ The defendants who entrusted the motor vehicle are (names):
☒ Does 1 to 100,
e. ☒ The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were (names):
☒ Does 1 to 100,
f. ☒ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
☐ listed in Attachment MV-2f ☐ as follows:
Defendants who negligently designed, manufactured, sold, tested, inspected, repaired, replaced, maintained or performed any type of work on defendant's vehicle or any component parts thereof.
☒ Does 1 to 100,

Appendix H

SHORT TITLE: ERIKSEN v. SCHULER, et al.	CASE NUMBER:

FIFTH (number) **CAUSE OF ACTION—Motor Vehicle** Page 8

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff (name): LISA CHRISTINE ERIKSEN,

MV-1. Plaintiff alleges the acts of defendants were negligent, the acts were the legal (proximate) cause of injuries and damages to plaintiff. The acts occurred
on (date): November 25, 1988
at (place): Escondido, California

MV-2. DEFENDANTS
a. ☒ The defendants who operated a motor vehicle are (names):
DEBRA MAJICK,
☐ Does 1 to 100,
b. ☒ The defendants who employed the persons who operated a motor vehicle in the course of their employment are (names):
☐ Does 1 to 100,
c. ☒ The defendants who owned the motor vehicle which was operated with their permission are (names):
DEBRA MAJICK,
☐ Does 1 to 100,
d. ☒ The defendants who entrusted the motor vehicle are (names):
☐ Does 1 to 100,
e. ☒ The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were (names):
☐ Does 1 to 100,
f. ☒ The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
☐ listed in Attachment MV-2f ☒ as follows:
Defendants who negligently designed, manufactured, sold, tested, inspected, repaired, replaced, maintained or performed any type of work on defendant's vehicle or any component parts thereof.
☐ Does 1 to 100

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SHORT TITLE: ERIKSEN v. SCHULER, et al.,	CASE NUMBER:

FOURTH (number) CAUSE OF ACTION—Motor Vehicle Page 7

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff (name): LISA CHRISTINE ERIKSEN,

MV-1. Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred
on (date): November 29, 1988
at (place): San Fernando Valley, Los Angeles County, California

MV-2. DEFENDANTS
a. ☐ The defendants who operated a motor vehicle are (names):

b. ☒ The defendants who employed the persons who operated a motor vehicle in the course of their employment are (names):
☒ Does 1 to 100.

c. ☒ The defendants who owned the motor vehicle which was operated with their permission are (names):
☒ Does 1 to 100.

d. ☒ The defendants who entrusted the motor vehicle are (names):
☒ Does 1 to 100.

e. ☒ The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were (names):
☒ Does 1 to 100.

f. ☒ The defendants who are liable to plaintiff for other reasons and the reasons for the liability are
☐ stated in Attachment MV-2f ☒ as follows:
Defendants who negligently designed, manufactured, sold, tested, inspected, repaired, replaced, maintained or performed any type of work on defendant's vehicle or any component parts thereof.

☒ Does 1 to 100.

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SHORT TITLE: ERIKSEN V. SCHULER, et al.	CASE NUMBER

SIXTH (Number) **CAUSE OF ACTION—General Negligence** Page 9

ATTACHMENT TO ☐ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

GN-1. Plaintiff (name): LISA CHRISTINE ERIKSEN,

alleges that defendant (name):

☒ Does 1 to 100,

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act defendant negligently caused the damage to plaintiff

on (date): November 25, 1988, November 29, 1988, December 8, 1988
at (place): Ventura County, May 8, 1989 and September 6, 19
Los Angeles County and San Diego County

(description of reasons for liability)

Doe defendants committed negligent acts towards plaintiff which are unknown at this time.

Appendix H

L. M. SCHULWER
& ASSOCIATES
360 Mobil Avenue, Suite 107
Camarillo, California 93010
(805) 484-0453

Attorney for Plaintiff
LISA ERICKSEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LISA C. ERIKSEN, Plaintiffs, vs. WILLIAM J. SCHULER, QUALITY ROCK COMPANY, INC., JEFFREY KRULL, JEFFREY AHRENS, DEBORAH MAJICK, and DOES 1 through 100, Inclusive, Defendants.	Case No.: NWC053623 STATEMENT OF DAMAGES (C.C.P. Section 425.11)

The nature and amount of damages sought in the above action for plaintiff, LISA C. ERIKSEN, are as follows:

1. For general damages in the amount of $750,000.00;

2. For all medical and incidental expenses incurred in accordance to proof, amounting to approximately $8,278.00 to date;

3. For loss of earnings in accordance to proof, amounting to approximately $1,037.00 to date;

EXHIBIT B

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4. For future lost earnings and earning capacity, amount unknown at this time;

5. For such other relief as the court deems proper.

Dated: 6/21/84

L. M. SCHULNER
& ASSOCIATES

By: _____
Lawrence M. Schulner

Appendix H

LAJ-1017070

The Los Angeles DAILY JOURNAL
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Proof of Publication

(2015.5 C.C.P.)

State of California)
County of Los Angeles) ss

ERIKSEN V SCHULER NWC053623

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of THE LOS ANGELES DAILY JOURNAL, a daily newspaper printed and published in the English language in the City of Los Angeles, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of County of Los Angeles, State of California, under date of June 5, 1952, Case No. 599,382. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

11/22/91 11/29/91 12/06/91 12/13/91

EXECUTED ON : 12/13/91
AT LOS ANGELES, CALIFORNIA

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Signature

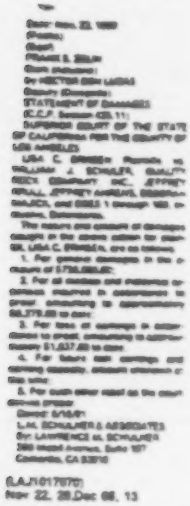
EXHIBIT C

ORIGINAL FILED
DEC 17, 1991
COUNTY CLERK
LOS ANGELES

ORIGINAL FILED
DEC 27 1991
COUNTY CLERK

SUMMONS
(Citacion Judicial)
Case Number: NWC053623
(Numero del Caso)
NOTICE TO DEFENDANT:
(Aviso al demandado)
WILLIAM JOSEPH SCHULER, Guardian Ad Litem for JEFFREY KRALL, JEFFREY KRALL, DEBORAH MALECA, and DOES 1 THROUGH 100, INCLUSIVE,
YOU ARE BEING SUED
(Lo está demandando)
BY PLAINTIFF
(El demandante)
LISA CHRISTINE ERIKSEN
You have 30 CALENDAR DAYS after this summons is served on you to file a response/answer at this court.
A letter or phone call will not protect you. Your response must be in proper legal form if you want the court to hear your case.
If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.
There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).
Tiene 30 DIAS CALENDARIOS después de que le entreguen esta citación y papeles legales para presentar una respuesta escrita a este corte.
Una carta o una llamada telefónica no le protegen. Su respuesta escrita tiene que estar en formato legal correcto si desea que procesen su caso en la corte.
Si usted no presenta su respuesta a tiempo, puede perder el caso y le quitan dinero y otras cosas sin mas advertencia por parte de la corte.
Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).
The name and address of the court is: (El nombre y dirección de la corte es):
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES - NORTHWEST JUDICIAL DISTRICT - [illegible]
The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
L.H. Schuler, A Law Corporation, [illegible]

Appendix H



Nov 22, 28,Dec 06, 13

Appendix H

L. M. SCHULWER
L. M. SCHULWER & ASSOCIATES
360 Mobil Avenue, Suite 107
Camarillo, CA 93010 Plaintiff-Eriksen

(805) 484-0453

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES-NORTHWEST DIST.

PLAINTIFF
LISA ERIKSEN,

DEFENDANT
WILLIAM JOSEPH SCHULER, et al.,

REQUEST FOR [X] ENTRY OF DEFAULT [ ] CLERK'S JUDGMENT [ ] COURT JUDGMENT

Case number: NWC053623

1. TO THE CLERK: On the complaint or cross-complaint filed
a. on (date): November 22, 1989
b. by (name): Lisa Eriksen,
c. [X] Enter default of defendant (names):
WILLAIM JOSEPH SCHULER, QUALITY ROCK COMPANY, INC., DEBORAH MAJICK,

d. [ ] I request a court judgment under CCP 585(b), (c), 989, etc. (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under CCP 585(d).)
e. [ ] Enter clerk's judgment
(1) [ ] for restitution of the premises only and issue a writ of execution on the judgment. CCP 1174(c) does not apply. (CCP 1169)
(2) [ ] under CCP 585(b). (Complete the declaration under CCP 585.5 on the reverse.)
(3) [ ] for default previously entered on (date):

2. Judgment to be entered	Amount	Credits Acknowledged	Balance
a. Demand of complaint	$	$	$
b. Statement of damages (CCP 425.11) (superior court only)*			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs (see reverse)	$	$	$
e. Attorney fees	$	$	$
f. TOTALS	$	$	$

g. Daily damages were demanded in complaint at the rate of: $ per day beginning (date):

Date: March 4, 1992

LAWRENCE M. SCHULWER
(TYPE OR PRINT NAME)

▶ [signature]
(SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

*Personal injury or wrongful death actions only.

FOR COURT USE ONLY

(1) [ ] Default entered as requested on (date):
(2) [ ] Default NOT entered as requested (state reason):

By _____

(Continued on reverse)

Form Adopted by the Judicial Council of California
Rev. (date)

REQUEST FOR ENTRY OF DEFAULT

CCP 585(d)

EXHIBIT D

Appendix H

§38.1

SHORT TITLE	CASE NUMBER
ERIKSEN v. SCHULER, et al.,	MWC053623

DECLARATION UNDER CCP 585.5 (Required for clerk's judgment under CCP 585(a))

3. This action
a. [ ] is [X] is not on a contract or installment sale for goods or services subject to CC 1801, etc. (Unruh Act)
b. [ ] is [X] is not on a conditional sales contract subject to CC 2981, etc. (Rees-Levering Motor Vehicle Sales and Finance Act)
c. [ ] is [X] is not on an obligation for goods, services, loans, or extensions of credit subject to CCP 395(b)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: March 4, 1992

LAWRENCE M. SCHULNER
(TYPE OR PRINT NAME OF DECLARANT)

▶ [signature]
(SIGNATURE OF DECLARANT)

DECLARATION OF MAILING (CCP 587)

4. A copy of the foregoing request was
a. [ ] not mailed to the following defendants whose addresses are unknown to plaintiff or plaintiff's attorney (name):

b. [X] mailed first-class, postage prepaid, in a sealed envelope to each defendant's attorney of record, or if none, to each defendant at defendant's last known address
(1) on (date): March 4, 1992
(2) to (identify names and addresses shown on the envelopes):

William Joseph Schuler
3159 Galveston Avenue
Simi Valley, CA 93063

Quality Rock Company, Inc.
33 High Street
Moorpark, CA 93021

Deborah Majick
2826 Oakhill Drive
Escondido, CA 92027

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: March 4, 1992

LYNN FREEMAN
(TYPE OR PRINT NAME)

▶ [signature]
(SIGNATURE OF DECLARANT)

MEMORANDUM OF COSTS (Required if judgment requested)

5. Costs and disbursements are as follows (CCP 1033.5):
a. Clerk's filing fees $
b. Process server's fees $
c. Other (specify): $
d $
e. TOTAL $
f. [ ] Costs and disbursements are waived

I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in the case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

▶
(SIGNATURE OF DECLARANT)

DECLARATION OF NONMILITARY STATUS

6. The defendant named above in item 1c is in the military service so as to be entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. Appen. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: March 4, 1992

LAWRENCE M. SCHULNER
(TYPE OR PRINT NAME)

▶ [signature]
(SIGNATURE OF DECLARANT)

REQUEST FOR ENTRY OF DEFAULT

Page two

Appendix H

L.M. SCHULNER & ASSOCIATES
360 Mobil Avenue, Suite 107
Camarillo, California 93010
(805) 484-0453

Attorney for Plaintiff(s),
Lisa Kristine Erickson

ORIGINAL FILED

MAR 2 2 1993

LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

LISA KRISTINE ERICKSON, Plaintiff, vs. WILLIAM JOSEPH SCHULER, QUALITY ROCK COMPANY INCORPORATED, et al., Defendants.	Case No. NWC 053623 DEFAULT JUDGMENT BY THE COURT

This cause came on for hearing on February 24, 1993, in Department NW "A" of the above-entitled court, Lawrence M. Schulner of L.M. Schulner & Associates appearing for plaintiff.

It appearing that QUALITY ROCK COMPANY INCORPORATED having been regularly served with process, having failed to appear and answer plaintiff's complaint filed herein; and defendant, WILLIAM JOSEPH SCHULER, having been regularly served with summons by publication, both parties having failed to appear and answer plaintiff's complaint

EXHIBIT E

Appendix H

within the time allowed by law, and the default of said defendant having been entered; on application to the court and proof of publication of the allegations of plaintiff's complaint having been made to the satisfaction of the court,

IT IS HEREBY ORDERED, that defendant William Joseph Schuler was acting within the course and scope of his employment with Quality Rock Company Incorporated at the time of the incident. That plaintiff have and recover judgment from Quality Rock Company Incorporated and William Joseph Schuler as follows: General damages in the sum of two hundred twenty thousand dollars ($220,000.00); special damages in the sum of eight thousand five hundred dollars ($8,500.00) plus costs of the suit herein together with interest on the judgment as provided by law.

DATED: MAR 22 1993

ROBERT M. LETTEAU
Judge of the Superior Court

APPENDIX I — DECLARATION OF STEVEN G. COHN AND EXCERPTED EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES DATED SEPTEMBER 29, 1995, ERIKSEN V. CONDOR INSURANCE COMPANY, LOS ANGELES COUNTY SUPERIOR COURT Case No. BC109937

DECLARATION OF STEVEN G. COHN

I, STEVEN G. COHN, declare as follows:

1. I am an attorney at law licensed to practice before all Courts of the State of California, and am the attorney of record for Plaintiff herein. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify thereto.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Summons filed and served in the underlying litigation.

3. Attached hereto as Exhibit "B" is a true and correct copy of the Complaint filed and served in the underlying litigation.

4. Attached hereto as Exhibit "C" is a true and correct copy of the Statement of Damages filed and served in the underlying litigation.

5. Schuler was served by publication in the underlying litigation which became effective on or about December 13, 1991. A true and correct copy of the notice published in the underlying litigation is attached hereto as Exhibit "Q".

6. Quality Rock was served by substituted service in the underlying litigation on or about June 20, 1991.

Appendix I

7. Plaintiff's Complaint in the underlying litigation sets forth six causes of action arising out of four different automobile accidents which all occurred during an eleven month period. However, Plaintiff did not suffer any serious or significant injury or property damage as a result of any of these automobile accidents other than the accident caused by Schuler.

8. All of these other accidents were included in Plaintiff's Complaint in the underlying litigation to prevent Schuler and/or Quality Rock from raising an "empty chair" defense in the underlying litigation. All of Plaintiff's claims against the other three defendants named in the underlying litigation were settled for nominal amounts or abandoned.

9. A true and correct copy of the default judgment in the underlying litigation is attached hereto as Exhibit "D".

10. On January 12, 1994 Quality Rock moved to set aside the default judgment entered in the underlying litigation. Quality Rock's Motion to Set Aside Default was denied. Quality Rock timely appealed the court's denial of Quality Rock's Motion to Set Aside Default. However, neither Quality Rock (on its own) or Condor (on Quality Rock's behalf) pursued the appeal in the underlying litigation. On July 18, 1995 the appeal in the underlying litigation was dismissed for lack of prosecution. A true and correct copy of the documents filed in connection with Quality Rock's Motion to Set Aside Default in the underlying litigation are attached hereto as Exhibit "M". A true and correct copy of the Court of Appeals Remittitur Notice finalizing the dismissal of Quality Rock's appeal in the underlying litigation is attached hereto as Exhibit "E".

11. On June 8, 1994, Defendant, Schuler, was examined at an oral judgment debtor examination under oath and before a court reporter. A true and correct of the transcript

of this judgment debtor examination is attached hereto as Exhibit "F".

12. Condor was first notified of the underlying accident and underlying litigation, at the latest, on or about December 3, 1993 by its insured, Quality Rock. A true and correct copy of the letter notifying Condor of these matters is attached hereto as Exhibit "G".

13. A true and correct copy of the July 18, 1994 letter from Plaintiff's attorneys to Condor's attorneys is attached hereto as Exhibit "H".

14. Condor did not attempt to set aside the default entered against its insureds in the underlying litigation. In fact, Condor did not even pursue the appeal in the underlying litigation, intervene in the underlying litigation, undertake to defend its insureds in the underlying litigation or do anything else to protect its insureds interests in the underlying litigation.

15. When the underlying accident occurred on September 6, 1989 Quality Rock and Schuler were insured by Condor under Condor's policy of commercial carrier automobile insurance a true and correct copy of which is attached to Condor's Cross-Complaint filed in this case.

16. A true and correct copy of the mandatory PUC endorsement which incorporated in every policy of common carrier insurance issued in the State of California is attached hereto as Exhibit "I".

17. A true and correct copy of Plaintiff's First Amended Complaint in this matter is attached hereto as Exhibit "J".

18. A true and correct copy of Condor's Answer to Plaintiff's First Amended Complaint in this matter is attached hereto as Exhibit "K".

19. A true and correct copy of Condor's Cross-Complaint in this matter is attached hereto as Exhibit "L".

20. There are absolutely no facts in this litigation which indicate that the judgment in the underlying litigation was the result of any extrinsic fraud, extrinsic mistake or collusion.

21. When Quality Rock moved to set aside the default entered against it in the underlying litigation, Quality Rock requested the court to exercise its equitable powers to set aside the default in the underlying litigation on the grounds that the default in the underlying litigation was the result of extrinsic mistake and/or extrinsic fraud. (See Exhibit "M"). Further, Quality Rock's Motion to Set Aside Default in the underlying litigation was made on the grounds that the judgment in the underlying litigation was void because of an alleged defect in the Summons and because Plaintiff did not allegedly serve the right person at Quality Rock with the Summons & Complaint. Also, other related and included matters were necessarily adjudicated in connection with Quality Rock's Motion to Set Aside Default in the underlying litigation.

22. The court in the underlying litigation specifically permitted the parties in the underlying litigation to conduct discovery into the matters put at issue in Quality Rock's Motion to Set Aside Default in the underlying litigation. In fact, depositions were taken in the underlying litigation and both parties did in fact examine the deponents. Further, this deposition testimony was actually used by both Erickson and Quality Rock at the hearing on Quality Rock's Motion to Set Aside Default Judgment in the underlying litigation.

23. Quality Rock's Motion to Set Aside Default in the underlying litigation was denied. Quality Rock timely appealed from the Judgment in the underlying litigation.

Subsequently, Quality Rock has declared bankruptcy. Neither Quality Rock or Condor pursued the appeal from the Final Judgment in the underlying litigation and the dismissal for lack of prosection became final on September 20, 1995. A true and correct copy of the Remittitur from the Court of Appeal regarding Quality Rock's Appeal from the underlying litigation is attached hereto as Exhibit "E".

24. Quality Rock was first served with the Summons & Complaint in the underlying litigation on or about June 20, 1991.

25. I am aware of absolutely no admissible evidence that would indicate that Quality Rock or Schuler have a meritorious defense to the underlying litigation.

26. A true and correct copy of correspondence between Plaintiff's attorneys and Condor's attorneys regarding the Court of Appeals decision in *Hand v. Farmers Insurance* (1994 Cert. denied) 23 Cal.App 4th 1847 is attached hereto as Exhibit "O".

27. A true and correct copy of Condor's Arbitration Brief filed in this case is attached hereto as Exhibit "P".

28. A true and correct copy of the Arbitration award rendered in this case is attached hereto as Exhibit "N".

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have executed this Declaration this 29th day of September, 1995, at Westlake Village, California.

/s/ STEVEN G. COHN

STEVEN G. COHN

Appendix I

Standard Form of Endorsement Prescribed by the Public Utilities Commission of the State of California

TO BE ATTACHED TO AND MADE A PART OF ALL POLICIES INSURING MOTOR VEHICLES SUBJECT TO REGULATION BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The policy to which this endorsement is attached is an Automobile Bodily Injury Liability and Property Damage Liability policy and is hereby amended to assure compliance by the insured, as a motor carrier of property, with General Order No. 100-Series and the pertinent rules and regulations of the Public Utilities Commission of the State of California

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay, within the limits of liability hereinafter provided, any final judgment rendered against the insured for bodily injury to or death of any person, or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and loss of or damage to property owned by, rented to, in charge of, or transported by the insured), resulting from the operation, maintenance, or use of motor vehicles and/or trailers for which a certificate of public convenience and necessity or permit is required or has been issued to the insured by the Public Utilities Commission of the State of California, regardless of whether such motor vehicles and/or trailers are specifically described in the policy or not, and/or resulting from any other action by the insured and/or the insured's employees while engaged in the course of performing under the aforementioned certificate of public convenience and necessity or permit.

Appendix I

Within the limits of liability hereinafter provided it is further understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company, and the insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is understood and agreed that, upon failure of the Company to pay any final judgment rendered against the insured as provided herein, the judgment credit may maintain an action in any court of competent jurisdiction against the Company to compel such payment.

The liability of the Company for the amounts provided in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the Company for the payment of final judgments resulting from any other accident.

Appendix I

Schedule of Limits
Bodily Injury Liability and Property Damage Liability

(check one)

	For bodily injuries to or death of one person	$250,000
☐	For bodily injuries to or death of all persons injured or killed (subject to a maximum of $250,000 for bodily injuries to or death of one person)	$500,000
	For loss or damage to property of others (excluding cargo)	$100,000
or		
☐	Combined Single Limit	$600,000

Nothing in this endorsement shall be construed to limit or restrict any coverage otherwise provided by the policy of which this endorsement is made a part.

Whenever required by the Commission, the Company agrees to furnish to the Commission a duplicate original of said policy and all endorsements thereon.

The Company further agrees that such insurance as is afforded by the policy and this endorsement against liability for injuries to or death of persons and damage to or destruction of property shall not be cancelled, rescinded, or suspended, nor shall the cancellation, rescission, or suspension of the policy or this endorsement take effect, nor shall the policy or this endorsement become void for any reason whatsoever until the Company shall have first given thirty (30) days' notice in writing to the Public Utilities Commission of the State of California at its office, San Francisco, California, said thirty (30) days' notice to commence to run from the date notice is actually received in the office of said Commission.

Appendix I

The Company further agrees that if the policy shall be cancelled or suspended or otherwise terminated, and shall thereafter be reinstated, notice in writing of such reinstatement shall immediately be given by the Company to said Commission at its said office.

When countersigned by an authorized representative of the Company, this endorsement becomes a part of

Policy No. ..... issued by .....

(herein called Company) of .....

to .....

effective _____
12:01 a.m. standard time at the address of the insured as signed in policy.

Countersigned at ..... this ... day of ..., 19...

By (Signature) .....
(Authorized Company Representative)

Name of Person Signing .....
(Please Type)

Appendix I

LAW OFFICES OF
WILLIAM D. KOEHLER
A PROFESSIONAL CORPORATION
12522 MOORPARK STREET
STUDIO CITY, CALIFORNIA 91604
TELEPHONE (818) 506-8322
BAR NO. 61755

Attorneys for Defendant QUALITY ROCK CO., INC.

(SPACE BELOW FOR FILING STAMP ONLY)
FILED
DEC 16 1993
JAMES H. DEMPSEY, CLERK
A BRADY
By A. BRADY, DEPUTY

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LISA CHRISTINE ERIKSEN,
Plaintiff,
vs.
WILLIAM JOSEPH SCHULER, QUALITY ROCK COMPANY, INCORPORATED, JEFFREY KRULL, JEFFREY AHRENS, DEBORAH MAJICK and DOES 1 through 100, Inclusive,
Defendants.

CASE NO. NWC 053623
NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT, TO VACATE DEFAULT JUDGMENT, TO QUASH

EXHIBIT M

Appendix I

WRIT OF EXECUTION, AND TO QUASH LEVY; DECLARATIONS OF PATRICIA LOMBARDO AND WAYNE J. JONES; POINTS AND AUTHORITIES (PROPOSED ANSWER ATTACHED)
DATE: January 12, 1994
TIME: 9:00 a.m.
DEPT: M
TRIAL DATE: None

TO: PLAINTIFF LISA CHRISTINE ERIKSEN AND TO HER ATTORNEY OF RECORD LAWRENCE M. SCHULNER:

PLEASE TAKE NOTICE that on January 12, 1994 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department M of the above-entitled Court, located at 6230 Sylmar Avenue, Van Nuys, California, Defendant QUALITY ROCK COMPANY, INCORPORATED (hereinafter referred to as "QUALITY ROCK") will move the Court for an order setting aside the default, vacating the default judgment entered against Defendant QUALITY ROCK, quashing the Writ of Execution, and quashing the levy thereon.

This motion is based upon the grounds that:

1. There is no personal jurisdiction over Defendant Corporation due to defective service of the Summons and Complaint.

2. The default was improperly entered against this Defendant.

3. The Judgment entered pursuant to the default is void.

4. The Writ of Execution based on a void judgment is unenforceable and must be quashed.

5. The levy must be quashed.

This Motion is further based upon this notice, the Declarations of Patricia Lombardo and Wayne J. Jones attached hereto, the Points and Authorities attached hereto, the pleadings on file herein, and such evidence as may be presented at the hearing on the motion.

DATED: December 15, 1993

LAW OFFICE OF
WILLIAM D. KOEHLER, APC

By: /s/ JAMES W. WILEY
JAMES W. WILEY,
Attorney for Defendant
QUALITY ROCK
COMPANY INCORPORATED

Appendix I

DECLARATION OF PATRICIA LOMBARDO

I, PATRICIA LOMBARDO, if called as a witness, could and would competently testify to the following of my own personal knowledge:

1. I am over the age of eighteen and not a party to this action.

2. I am currently the office secretary for Defendant QUALITY ROCK CO., INC. and have been employed in that capacity since September 1, 1987. Our office hours are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays.

3. My desk is adjacent to the only entrance to our office and is the first thing one sees when entering our office. It would be impossible for someone to enter the office without my knowledge.

4. Part of my duties are to open all the daily mail and distribute it to whomever would be responsible for dealing with the issue presented by that correspondence.

5. On or about September 6, 1989, I was informed that one of our trucks was involved in a traffic accident with Lisa Eriksen on Las Virgenes Road. Upon learning of this traffic accident, I requested a copy of the traffic accident report from the Highway Patrol.

6. Upon receipt of the traffic accident report, I noted that the investigating officer determined that the accident was caused by Ms. Eriksen by driving alongside our truck and making an unsafe pass on the right in violation of Vehicle Code § 21755.

7. On or about October 2, 1989, I received a letter from Wheels Inc., a car rental agency that purportedly rented the vehicle to Ms. Eriksen, which was involved in the traffic

accident. I notified Wheels Inc. by letter that our driver was not at fault.

8. On December 28, 1989 I received a telephone call from a Mr. James Andrews of Wheels Inc. regarding the traffic accident. I informed him of my prior letter and that the traffic accident was not our fault. I never heard anything further from him or anyone at Wheels Inc.

9. At the time we were notified of the traffic accident I set up a file on this matter, and all documents and correspondence were placed in this file.

10. On or about June 20, 1991, a person came to the office of Quality Rock Co., Inc. asking for Wayne Jones. When I told this person that Mr. Jones was not in the office, I was handed a document and told to give it to Mr. Jones. Upon looking at this document I saw that it was a Summons and Complaint for this lawsuit. There was no designation on the front of the Summons as to who or what was being served, nor was the date of service filled in. A copy of this Summons is attached hereto as Exhibit A.

11. Prior to this date I had never been presented or served with any legal documents. We never received any further letters or a copy of this document in the mail or by delivery.

12. I passed on the documents to Mr. Wayne Jones and presumed he would deal with it by submitting it to our insurance company, which was our usual procedure in these matters.

13. On November 23, 1993, I was informed by Mr. Jones that Quality Rock Co., Inc. had been served with a notice of Levy and that a judgment had been entered against Quality Rock Co., Inc.

14. I subsequently met with Attorney William D. Koehler in preparation of this declaration. Mr.Koehler showed me a Request for Entry of Default dated March 4, 1992 and a Default Judgment by the Court. I have no recollection of ever having received either of those documents by mail or personal service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of December, 1993, at Moorpark, California.

/s/ PATRICIA LOMBARDO
PATRICIA LOMBARDO

Appendix I

DECLARATION OF WAYNE J. JONES

I, WAYNE J. JONES, if called as a witness, could and would competently testify to the following of my own personal knowledge:

1. I am over the age of eighteen and not a party to this action.

2. Quality Rock Co., Inc. is a California corporation licensed to do business in California and doing business at 33 East High Street, Suite F, Moorpark, CA 93021.

3. On January 28, 1986, a Statement by Domestic Stock Corporation was filed with the Secretary of State showing the agent for service of process on the corporation as Wayne J. Jones, 33 East High Street, Suite F, Moorpark, CA 93021 (a copy of this Statement by Domestic Stock Corporation is attached hereto and marked Exhibit B). The agent for service of process was never changed.

4. Prior to January 16, 1991 I was President of the Corporation. On January 16, 1991 I resigned and my son, Brett Jones, was elected President. My purpose in resigning was to retire, although I continued to draw a salary, consult with, and provide guidance to the corporation. Part of that guidance is my presence at the office several days a week to review and oversee company business and to answer any questions which might come up.

5. My desk was located at the back of the office and any mail or correspondence I was to review was placed on my desk when I came in to work.

6. At no time did I ever receive any documents entitled Request for Entry of Default or Default Judgment by the Court.

7. The first I learned of this judgment was when I was contacted by Brett Jones on November 22, 1993. On that date, I was informed that a "keeper" was at the office and he had a Writ of Execution for $240,088.50.

8. At the time of this traffic accident, Defendant William Joseph Schuler was not an employee of Quality Rock Co., Inc., and at all times thereafter Quality Rock Co., Inc. was fully insured for matters of this nature. Upon receiving a Summons and Complaint, we would have immediately sent it to our insurance company to handle for us.

9. If this judgment cannot be set aside and the matter tendered to our insurance company, this judgment will force the Corporation into bankruptcy.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of December, 1993, at Moorpark, California.

/s/ WAYNE J. JONES
WAYNE J. JONES

APPENDIX J — SUPPLEMENTAL DECLARATION OF STEVEN G. COHN AND EXCERPTED EXHIBIT R IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION DATED OCTOBER 25, 1995 ERIKSEN V. CONDOR INSURANCE COMPANY, LOS ANGELES COUNTY SUPERIOR COURT Case No. BC 109937

Appendix J

I, STEVEN G. COHN, declare as follows:

1. I am an attorney at law licensed to practice before all Courts of the State of California, and am the attorney of record for Plaintiff herein. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify thereto.

2. Attached hereto as Exhibit "R-1" through "R-47" is a true and correct copy of the "Notice of Accident" which Condor received in December 1993, and all of the documents which were attached to that Notice. The Notice is stamped as received by the Condor Claims Department on December 3, 1993. Said Notice was obtained by Plaintiff from Defendant, Condor, in Condor's Response to Plaintiff's Request for Production of Documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have executed this Declaration this 25th day of October, 1995, at Westlake Village, California.

STEVEN G. COHN

0512.pl

Appendix J

TOLMAN AND WIKER INSURANCE
TWD INSURANCE SERVICES

SINCE 1923

December 2, 1993

Interstate Program Managers, Inc.
Attention: Claims Department
2041 Rosecrans Blvd.
El Segundo, CA 90245

Subject: Quaility Rock Company
Policy No. GBP20R001024
Date of Loss 9/6/89

Attached please find accord auto loss notice along with all the documentation relating to the claim.

Please handle accordingly and advise our insured of receipt of claim as soon as possible.

Thank you for your assistance.

Sincerely,

Shirley Rhoads
Claims Representative

Encl.

cc: H & H Associates, Ltd.
Mr. Fritz R. Huntsinger

CONDOR
DEC 03 1993
CLAIMS DEPT.

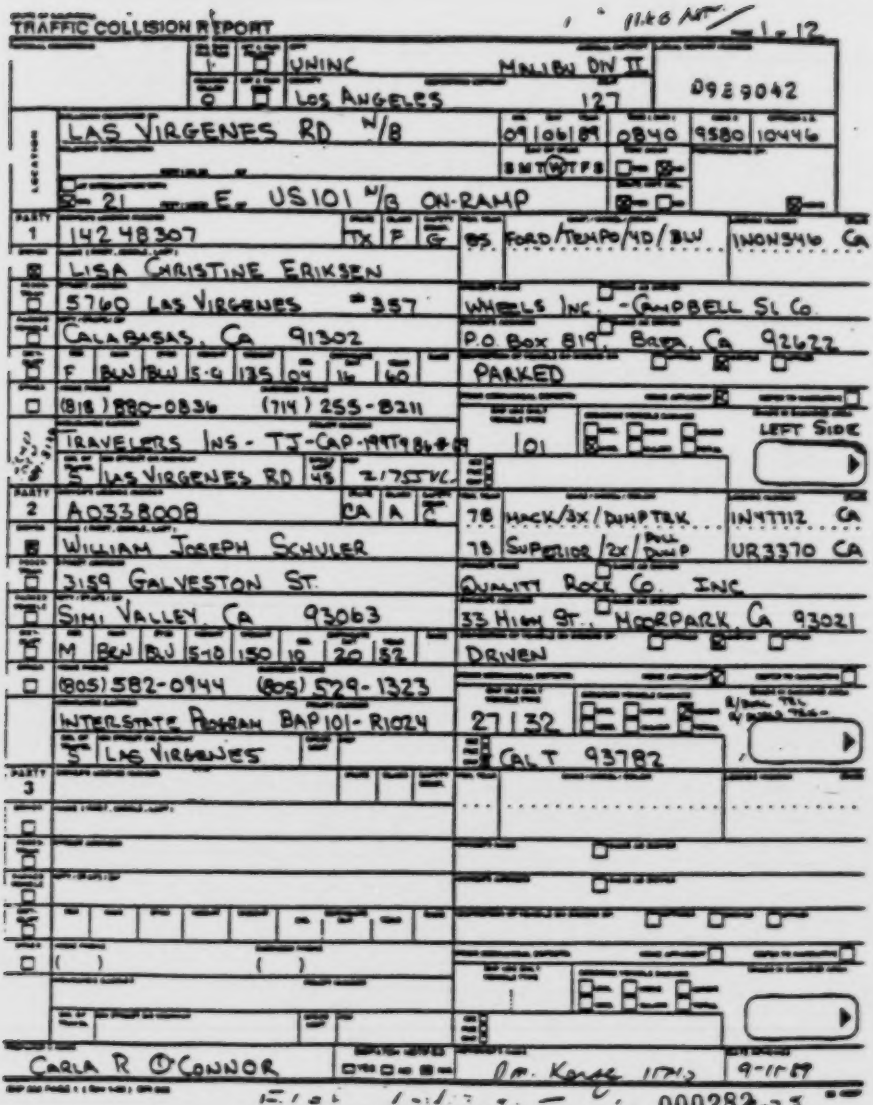
000255

196 SO. FIR STREET, P.O. BOX 1388, VENTURA, CA. 93002 • PHONE 805-653-7744 • 485-3304 • FAX 805-653-7762

R-1

EXHIBIT R

Appendix J



TRAFFIC COLLISION REPORT

1 of 11.46 MI = 1 = 12

UNINC — MALIBU DIV II — 0982042

LOS ANGELES — 127

LAS VIRGENES RD W/B — 09/06/89 — 0840 — 9580 — 10446

21 E. US101 W/B ON-RAMP

PARTY 1

1424 8307 — TX — F — G

LISA CHRISTINE ERIKSEN

5760 LAS VIRGENES #357

CALABASAS, CA 91302

F | BRN | BRN | 5-4 | 135 | 04 | 16 | 40

(818) 880-0836 (714) 255-8211

TRAVELERS INS - TJ-CAP-19T9864-89

5 LAS VIRGENES RD — 45 — 21755VC

VEH — 85 — FORD/TEMPO/4D/BLU — 1NDN546 CA

WHEELS INC. - CAMPBELL SL CO

P.O BOX 819 BREA, CA 92622

PARKED

101 — LEFT SIDE

PARTY 2

A0338008 — CA — A — C

WILLIAM JOSEPH SCHULER

3159 GALVESTON ST.

SIMI VALLEY, CA 93063

M | BRN | BLU | 5-10 | 150 | 10 | 20 | 52

(805) 582-0944 (805) 529-1323

INTERSTATE PROGRAM BAP101-R1024

5 LAS VIRGENES

VEH — 78 — HACK/3X/DUMPTRK — IN47712 CA

78 — SUPERIOR/2X/PULL DUMP — UR3370 CA

QUALITY ROCK CO. INC.

33 HIGH ST. MOORPARK, CA 93021

DRIVEN

27 | 32

CAL T 93782

PARTY 3

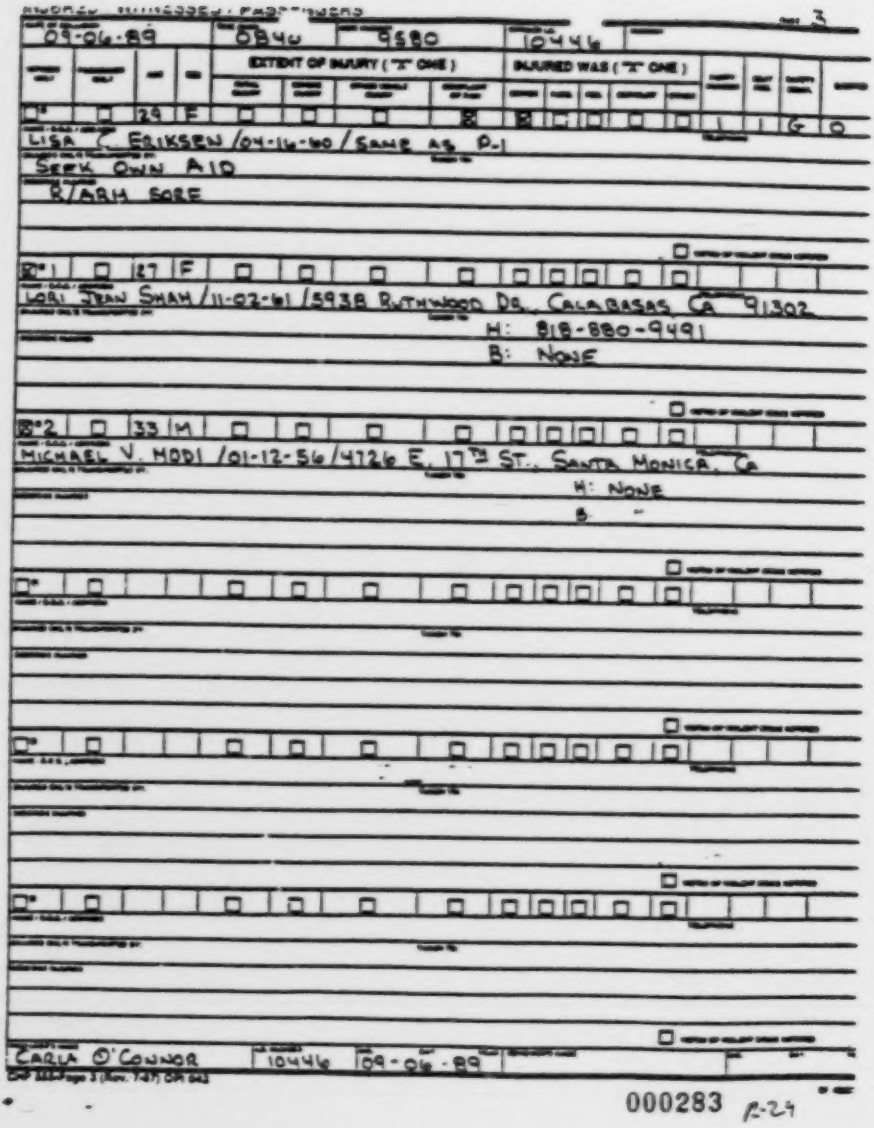
( ) ( )

CARLA R O'CONNOR

D.R. Kenyon 1774 — 9-11-89

000282

Appendix J



09-06-89 | 0840 | 9580 | 10446

EXTENT OF INJURY ("X" ONE) | INJURED WAS ("X" ONE)

P* | 29 | F | | | | X | B

LISA C ERIKSEN / 04-14-60 / SAME AS P-1

SEEK OWN AID

R/ARM SORE

W*1 | 27 | F

LORI JEAN SHAH / 11-02-61 / 5938 RUTHWOOD DR. CALABASAS CA 91302

H: 818-880-9491

B: NONE

W*2 | 33 | M

MICHAEL V. MODI / 01-12-56 / 4726 E. 17TH ST. SANTA MONICA, CA

H: NONE

B: -

CARLA O'CONNOR | 10446 | 09-06-89

000283 P-24

Appendix J

NARRATIVE/SUPPLEMENTAL

09-06-89	0840	9580	10446	

LEGEND

VEHICLES POINT OF REST

V-1 (FORD) (1N0N546/CA) — 4/E - 6' E/OF THE W/PROLONGATION OF LAS VIRGENES RD. 7' N/OF S/PROLONGATION OF LAS VIRGENES RD

4/R - 8' E/OF THE W/PROLONGATION OF LAS VIRGENES RD. 9' N/ OF S/ PROLONGATION OF LAS VIRGENES RD.

PHYSICAL EVIDENCE

(A)-(B) - 13' BRUSH SKIDMARK -

A - 8' E/OF W/ PROLONGATION OF LAS VIRGENES RD
8' N/OF S/ PROLONGATION OF LAS VIRGENES RD

B - 9' E/OF W/PROLONGATION OF LAS VIRGENES RD
21' N/OF S/PROLONGATION OF LAS VIRGENES RD

(C) GLASS DEBRIS - 2' DIA

(C) 7' E/OF W/PROLONGATION OF LAS VIRGENES RD
2' N/OF S/PROLONGATION OF LAS VIRGENES RD

CARLA O'CONNOR	10446	09-06-89		

000284 E-3

Appendix J

NARRATIVE/SUPPLEMENTAL

09-06-89	0840	9580	10446

FACTS

NOTIFICATION

I RECEIVED A CALL OF A PROPERTY DAMAGE ACCIDENT AT 0845 HRS RESPONDING FROM KANAN RD AT TROUTDALE. I ARRIVED AT THE SCENE AT 0847 HRS.

ALL TIMES, SPEEDS AND MEASUREMENTS ARE APPROXIMATE. MEASUREMENTS WERE TAKEN BY ROLL METER.

SCENE DESCRIPTION

LAS VIRGENES RD AT THE COLLISION SCENE IS A FOUR LANE, LEVEL, STRAIGHT RDWY WITH TWO LANES NORTHBOUND AND TWO SOUTHBOUND. THE NB IS SEPARATED FROM THE SB BY A 14' PAINTED ISLAND. THE ON-RAMP FOR W/B US 101 IS ADJACENT TO THE N/O OF THE INTERSECTION. THE INTERSECTION IS GOVERNED BY A TRI-LIGHT OVERHEAD SIGNAL. NO RDWY OBSTRUCTIONS OR VISUAL OBSCUREMENTS WERE PRESENT.

ALTHOUGH US 101 IS DESIGNATED AS AN NORTH-SOUTH RDWY IN THIS LOCATION IT ACTUALLY RUNS EAST-WEST

CARLA O'CONNOR	10446	09-06-89

000285

R-31

Appendix J

NARRATIVE/SUPPLEMENTAL

09-06-89	0840	4580	10446	
☒	☒	☐	☐	☐
☐	☐	☐	☐	☐

PHYSICAL EVIDENCE

BRUSH SKID MARK - A 13' BRUSH SKID MARK WAS OBSERVED IN THE #2 - S/B LANE OF LAS VIRGENES RD. AT POI #1 (REFER TO LEGEND AND DIAGRAM)

PAINT TRANSFER

BLU PAINT MATCHING V-1 WAS OBSERVED ON THE #2 REAR TRAILER DUAL RIM.

GLASS / DEBRIS

LOCATED IN #2 LANE S/O OF THE N/B PROLONGATION OF LAS VIRGENES RD (REFER TO LEGEND AND DIAGRAM)

OTHER FACTUAL INFORMATION

P-1 (ERIKSEN) DID NOT HAVE A CALIF. DRIVERS LICENSE AS REQUIRED PER RESIDENCY IN THE STATE OVER 10 DAYS. (PER 12505 VC). SHE RELATED SHE HAS RESIDED IN THE STATE OF CALIF. FOR ONE YEAR. P-1 WAS CITED AT THE SCENE FOR THIS VIOLATION.

STATEMENTS

P-1 (ERIKSON)

P-1 RELATED AT THE SCENE SHE WAS S/B LAS VIRGENES RD IN THE FAR RIGHT OF THE RIGHT LANE AND HAD PULLED ALONG SIDE A TRK PULLING A TRAILER THAT WAS STOPPED FOR THE SIGNAL. JUST AS SHE STOPPED THE SIGNAL

CARLA O'CONNOR | 10446 | 09-06-89

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Appendix J

NARRATIVE/SUPPLEMENTAL

09-06-89	0840	9580	10446	

STATEMENTS - CONTINUED

WITNESS #1 (SHAH)

W-#1 (SHAH) WAS LOCATED BEHIND V-2 (HACK) AND RELATED THE TRK WAS IN THE LARGE LANE (#2) AND DID NOT HAVE A SIGNAL ON. A SMALL CAR PULLED ALONG SIDE THE TRUCKS' RIGHT TO TURN RIGHT OUTO THE ON-RAMP THE TRUCK STARTED TO TURN RIGHT AND HIT THE VEHICLE. THE TRUCK DRAGGED THE CAR TO THE CURB BEFORE IT BROKE FREE

WITNESS #2 (MODI).

W#2- RELATED AT THE SCENE HE WAS HITCH-HIKING ON THE W/B US101 ON-RAMP APPROX. 80' DOWN THE RAMP WHEN HE HEARD A CAR CRASH. HE LOOKED UP AND OBSERVED A DUMP TRK PULLING A TRAILER TURNING ONTO THE RAMP WITH A BLU CAR BEING DRAGGED BY THE TRUCKS REAR. THE TRUCKER DIDN'T SEE THE CAR UNTIL HE LOOKED BACK CAUSE HE COULD SEE HIM LOOKING IN THE

Appendix J

NARRATIVE/SUPPLEMENTAL

09-06-89	0840	9580	10446	

POINTS OF IMPACT

POI WAS ESTABLISHED BY PHYSICAL EVIDENCE (SKIDMARK) AND BY BOTH PARTIES POINTING TO ITS LOCATION AS:

POI #1 : 20' S/OF THE N/PROLONGATION OF LAS VIRGENES RD
07' E/OF THE W/RDWY EDGE OF LAS VIRGENES RD.

CAUSE

P-1 (ERIKSEN) CAUSED THIS ACCIDENT BY DRIVING V-1 (FORD) ALONG SIDE V-2 (MACK) IN AN UNSAFE PASS ON THE RIGHT IN VIOLATION OF 21755 VC.

RECOMMENDATIONS

A COMPLAINT TO BE FILED WITH THE L A CO. DISTRICT ATTORNEY AGAINST P-1 ERIKSON FOR 21755 VC UNSAFE PASS ON THE RIGHT.

C R O'CONNOR	10446	09-11-89		

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APPENDIX K — STATUTORY ADDENDUM

WEST'S CALIFORNIA CODES
CODE OF CIVIL PROCEDURE

§ 425.10. Statement of facts; demand for judgment

A complaint or cross-complaint shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the pleader claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual or punitive damages for personal injury or wrongful death, in which case the amount thereof shall not be stated.

§ 425.11. Personal injury or wrongful death actions; statement of nature and amount of damages; service of statement

(a) As used in this section:

(1) "Complaint" includes a cross-complaint.

(2) "Plaintiff" includes a cross-complainant.

(3) "Defendant" includes a cross-defendant.

(b) When a complaint is filed in an action in the superior court to recover damages for personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff, who shall serve a responsive statement as to the damages within 15 days. In the event that a response is not served, the party, on notice to the plaintiff, may petition the court in which the

action is pending to order the plaintiff to serve a responsive statement.

(c) If no request is made for the statement referred to in subdivision (a), the plaintiff shall serve the statement on the defendant before a default may be taken.

(d) The statement referred to in subdivision (b) shall be served in the following manner:

(1) If a party has not appeared in the action, the statement shall be served in the same manner as a summons.

(2) If a party has appeared in the action, the statement shall be served upon his or her attorney, or upon the party if he or she has appeared without an attorney, in the manner provided for service of a summons or in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(e) The statement referred to in subdivision (b) may be combined with the statement described in Section 425.115.

§ 452. Liberal construction

PLEADINGS TO BE LIBERALLY CONSTRUED. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Appendix K

§ 473. Amendments permitted by court; enlargement of time to answer or demur; continuance, costs; relief from judgment, etc., taken by mistake, inadvertence, surprise, or excusable neglect; vacating default judgment; compensatory costs and legal fees; penalties; clerical mistakes in judgment or order; relief

(a)(1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(2) When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just.

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.

Appendix K

§ 580. Relief granted; scope

The relief granted to the plaintiff, if there is no answer, cannot exceed that which he or she shall have demanded in his or her complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
Title 13. Motor Vehicles

§ 220.06. Motor Carrier Financial Responsibility.

(a) Acceptable proof of financial responsibility, pursuant to Vehicle Code Section 34630, shall be submitted to the department in the form of a Certificate of Insurance, form [DMV MCP 65 (REV. 1/98)]; or a surety bond, form [DMV 55 (NEW 10/97)] pursuant to Vehicle Code Section 34631(b); or an Application for Certificate of Self-Insurance, form [DMV 130 (NEW 1/98)] pursuant to Vehicle Code Section 34631(c).

(1) Proof of financial responsibility pursuant to Division 7, Vehicle Code Section 16000 et seq. shall not be substituted for the proof required for a Motor Carrier.

(2) The name of the Motor Carrier on the certificate of insurance, surety bond or self-insurance certificate shall match the name of the Motor Carrier entered in Part 1 of form DMV 706.

(b) A Liability Insurance Policy Endorsement, form [DMV-MCP 67 (REV. 1/98)], amending the insurance policy to comply with insurance requirements imposed by

the Motor Carriers of Property Permit Act, commencing at Vehicle Code Section 34630, shall be attached to and made part of the insurance policy insuring the Motor Carrier.

(1) The Liability Insurance Policy Endorsement form [DMV 67 MCP (REV. 1/98)] shall be retained by the insurer and a copy provided to the insured Motor Carrier.

(2) A duplicate and all related documentation shall be provided to the department upon request.

(c) Written notice of cancellation of the certificate of insurance, required under Vehicle Code Section 34630(b), shall be submitted by the insurer to the department on a Notice of Cancellation of Insurance form [DMV-MCP 66 (Rev. 12/97)].

WEST'S CALIFORNIA CODES
INSURANCE CODE

§ 11580. Required policy provisions

A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this state unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.

(a) Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered:

(1) Against loss or damage resulting from liability for injury suffered by another person other than (i) a policy of workers' compensation insurance, or (ii) a policy issued by a nonadmitted Mexican insurer solely for use in the Republic of Mexico.

(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable, other than a policy which provides insurance in the Republic of Mexico, issued or delivered in this state by a nonadmitted Mexican insurer.

(b) Such policy shall not be thus issued or delivered to any person in this state unless it contains all the following provisions:

(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy.

(2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

WEST'S CALIFORNIA CODES
PUBLIC UTILITIES CODE

§ 3631. Liability protection; minimum amounts; cargo insurance; suspension of coverage (Repealed eff. Sept. 29, 1996, Stats. 1996 ch. 1042 §28)

The commission shall, in granting permits pursuant to this chapter, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as provided in Section 3632, against liability imposed by law upon the highway carrier for the payment of damages for personal bodily injuries, including death resulting therefrom, in the amount of not less than fifteen thou-

sand dollars ($15,000) on account of bodily injuries to, or death of, one person; and protection against a total liability of the highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than thirty thousand dollars ($30,000); and protection in an amount of not less than ten thousand dollars ($10,000) for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant.

The commission may, upon its own motion or upon the application of any interested party, and after hearing, require any highway carrier to procure and maintain cargo insurance in such amounts and upon such terms as the commission may determine.

Nothing in this chapter shall be construed to prohibit the suspension of accident liability insurance coverage on a portion of the highway carrier's vehicles covered by a certificate filed with the commission when such vehicles are not in use. This paragraph shall apply only to a highway carrier's vehicles which are laid up due to off-season conditions. Any highway carrier who desires to obtain a suspension of coverage under the provisions of this section shall remove his motor vehicle license plates and remove the identification symbols on vehicles not in use and shall notify in writing the agent or broker who wrote his insurance policy. The notification to the insurance broker or agent shall contain a complete description of all vehicles from which the license plates and identification symbols have been removed. The agent or broker shall immediately forward the notification to the commission and shall notify the insurer and the commission of the suspension of coverage on the specified vehicles.

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Before resuming trucking operations, the highway carrier shall apply to his agent or broker for reinstatement of his insurance. The application shall contain a complete description of the vehicles to be placed in operation again and shall contain a certification that the license plates and identification symbols have been placed on all vehicles. The agent or broker shall forward the application to the commission and advise the insurer and the commission that the insurance coverage on the specified vehicles has been resumed. It shall be unlawful for any highway carrier to operate any vehicle over the public highways when his insurance coverage is suspended pursuant to the provisions of this section.

§ 3632. Evidence of liability protection (Repealed eff. Sept. 29, 1996, Stats. 1996 ch. 1042 §28)

The protection required under Section 3631 shall be evidenced either:

By the deposit with the commission, covering each vehicle used or to be used under the permit applied for,

(1) Of a policy of insurance, issued by a company licensed to write such insurance in the state, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if such policies meet the rules promulgated therefor by the commission; or

(2) Of a bond of a surety company licensed to write surety bonds in the state; or

(3) Of such evidence of qualification of the carrier as a self-insurer as may be authorized by the commission.

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§ 3633. Deposit of copy, abstract, or certificate of insurance in lieu of policy (Repealed eff. Sept. 29, 1996, Stats. 1996 ch. 1042 §28)

With the consent of the commission a copy of an insurance policy, certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof, or an abstract of the provisions of the policy, or a certificate of insurance issued by the company issuing the policy, may be filed with the commission in lieu of the original or a duplicate or counterpart of the policy.

§ 3634. Continuance of protection; cancellation (Repealed eff. Sept. 29, 1996, Stats. 1996 ch. 1042 §28)

The protection against liability shall be continued in effect during the active life of the permit. The policy of insurance or surety bond shall not be cancelable on less than 30 days' written notice to the commission, except in the event of cessation of operations as a highway carrier as approved by the commission.

§ 3635. Rules; establishment (Repealed eff. Sept. 29, 1996, Stats. 1996 ch. 1042 §28)

The commission may establish such rules as are necessary to enforce this article.

WEST'S CALIFORNIA CODES
VEHICLE CODE

§ 34600. Short title

This division shall be known and may be cited as the Motor Carriers of Property Permit Act.

Appendix K

§ 34630. Proof of financial responsibility; certificate of insurance or surety bond; cancellation restrictions; lapse or termination; suspension of permit

(a) A motor carrier permit shall not be granted to any motor carrier of property until there is filed with the department proof of financial responsibility in the form of a currently effective certificate of insurance, issued by a company licensed to write that insurance in this state or by a nonadmitted insurer subject to Section 1763 of the Insurance Code, if the policy represented by the certificate meets the minimum insurance requirements contained in Section 34631.5. The certificate of insurance or surety bond shall provide coverage with respect to the operation, maintenance, or use of any vehicle for which a permit is required, although the vehicle may not be specifically described in the policy, or a bond of surety issued by a company licensed to write surety bonds in this state, or written evidence of self-insurance by providing the self-insured number granted by the department on a form approved by the department.

(b) Proof of financial responsibility shall be continued in effect during the active life of the motor carrier permit. The certificate of insurance shall not be cancelable on less than 30 days' written notice from the insurer to the department except in the event of cessation of operations as a permitted motor carrier of property.

(c) Whenever the department determines or is notified that the certificate of insurance or surety bond of a motor carrier of property will lapse or be terminated, the department shall suspend the carrier's permit effective on the date of lapse or termination unless the carrier provides evidence of valid insurance coverage pursuant to subdivision (a). If the carrier's permit is suspended, the carrier shall pay a reinstatement fee as set forth in Section 34623.5, and prior

to conducting on-highway operations, present proof of financial responsibility pursuant to subdivision (a) in order to have the permit reinstated.

UNITED STATES CODE
CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix K

CODE OF FEDERAL REGULATIONS
TITLE 49 — TRANSPORTATION

§ 387.15 Forms

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the FHWA and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in § 387.7 of this subpart. The continuous coverage requirement does not apply to Mexican motor carriers insured under § 387.7(b)(3) of this subpart. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I
[excerpted]

Form MCS-90 (3/82)

Form Approved

OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to _____ of _____

Dated at _____ this ____ day of _____, 19____

Amending Policy No. _____ Effective Date _____

Name of Insurance Company ____ Countersigned by ____

Appendix K

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X", for the limits shown:

This insurance is primary and the company shall not be liable for amounts in excess of $ _____ for each accident.

This insurance is excess and the company shall not be liable for amounts in excess of $ _____ for each accident in excess of the underlying limit of $ _____ for each accident.

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is: _____.

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, D.C.).

* * *

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with

sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

* * *

* * * It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

* * * [Denotes text deleted from original]

APPENDIX L — NATIONAL SURVEY OF INSURANCE REGULATIONS FOR MOTOR CARRIERS

Most of the other states have insurance requirements for truckers and other common carriers that require coverage-broadening endorsements, similar to the California PUC/DMV endorsement and federal ICC/DOT endorsement to be added to the policies insuring such motor carriers.

ALABAMA: *Michigan Mutual Liability Co. v. Carroll* 123, So.2d 920, 923 (Ala. 1960) [insurance requirements for truckers under Code of Alabama, 1940, Title 48, Section 301 (16)];

ARKANSAS: *Liberty Mutual Ins. Co. v. States,* 940 F.2d 1179, 1181-1182 (8th Cir. [Ark.], 1991) [insurance requirements for common and contract motor carriers under Ark. Ann. Stat., Section 73-1756 (1976) (then current version at Ark. Code Ann., Section 23-13-207 (1987))];

ARIZONA: *Fulton v. Woodford,* 498 P.2d 564, 566, 569 (Az. App. 1972) (Arizona motor carrier endorsement required by Corporation Commission);

CONNECTICUT: *University Overland Express v. Alsop,* 189 A. 458, 459 (Conn., 1936) (minimum insurance requirements for holders of permits to transport property under Conn. General Statutes, Cum-Sum 1935, Sections 592c and 593c);

COLORADO: *Maryland Casualty Co. v. Pacific Employers Ins. Co.,* 227 F.2d 485, 487 (10th Cir. [Colo.] 1955) (uniform public liability and property damage endorsement required by Public Utilities Commission of Colorado under Colorado Revised Statutes, Section 11, Article 10, Chapter 15);

DISTRICT OF COLUMBIA: *Thompson v. Amalgamated Cas. Ins. Co.,* 207 F.2d 214, 215-216 (D.C. Cir.

1953) [insurance requirements for passenger motor vehicles for hire under 52 Stat. 1233 (1938), 56 Stat. 1051) (1942), D.C. Code, Section 44-301 (1951)];

FLORIDA: *Ins. Co. of North America v. Morgan,* 406 So.2d 1227, 1228 (Fl. App.1981) (endorsement for trucker policy required under Fl. Stats. 1979, Section 323.07 and Florida Administrative Code Rule 25-5-31(5)(A)];

GEORGIA: *St. Paul Fire & Marine Ins. Co. v. Fleet Transport Co.,* 158 S.E.2d 476, 479 (Ga.App. 1967) (motor common carrier policy with certificate required by Public Service Commission under GA Code. Ann., Section 68-612;

ILLINOIS: *Country Mutual Ins. Co. v. Millers National Ins. Co.,* 534 N.E.2d 151, 153 (Ill.App. 1989) (trucker policy certificate filed with Illinois Commerce Commission under Ill. Rev. Stat. 1973, Ch 95 1/2, par. 18-701);

INDIANA: *Cushman Motor Delivery Co. v. Smith,* 1 N.E.2d 628, 630-631 (Ohio App. [Ind. Law] 1935) (policy issued to common carriers by motor trucks upon the public highways under Burns' Ann.St.Ind. 1933, Section 47-1203 [10166]);

IOWA: *Savery v. Kist,* 11 N.W.2d 23, 26-27 (Iowa 1943) [endorsement required by Iowa State Commerce Commission under Code of Iowa, CH 252-C1 (1935) then Code of Iowa, CH 252.3 (1939)];

KANSAS: *Briggs v. Burk,* 239 P.2d 981, 987 (Kan. 1952) (endorsement to truckers policy required by State Corporation Commission under Gen. Stats of Kansas (1935), Section 66-1,128);

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KENTUCKY: *Cotner v. Grissley,* 447 S.W.2d 603, 605 (Ky. App. 1969) (Department of Motor Transportation insurance requirements under Kentucky law);

MARYLAND: *Government Employee's Ins. Co. v. Concord General Mutual Ins. Co.,* 458 A.2d 1205 (1983) (no cancellation of policy without notice to Secretary of State under 29 M.R.S.A., Section 781(1)(A)]; *Cohen v. Pennsylvania Casualty Co.,* 38 A.2d 86, 87 (Md. App. 1944) (notification to Commissioner of Motor Vehicles of cancellation of policy issued to carrier of property or persons for hire under Md. Fin. Resp. Law, Section 182 of Art. 56);

MICHIGAN: *Cook v. Checker Mut. Auto Ins. Co.,* 60 N.W.2d 194, 195 (Mich. 1953) [taxi cab policy endorsement required under City of Detroit, Ordinance 87-C, Section 7(a)];

MINNESOTA: *Miller v. National Farmers Union Prop. & Gas. Co.,* 470 F.2d 700, 704 (8th Cir. [Minn.] 1972) (public liability endorsement required for truckers policy under M.S.A., Section 170-40 and Minn. Motor Carriers Act, Section 221.141);

MISSOURI: *Hawkeye Casualty Co. v. Halferty,* 131 F.2d 294, 295-296 (8th Cir. [Missouri] 1942) (endorsement required by Missouri Public Service Commission for motor carrier policies under Mo. Rev. Stat (1939), Section 5729, p. 1422, Mo. RSA 5729);

MISSISSIPPI: *Lloyds America v. Ferguson,* 116 F.2d 920, 922 (5th Cir. [Miss.] 1941) (Railroad Commission endorsement required for bus line policy under Code Miss. 1930, Section 7124); *American Fidelity & Cas. Co. v. Sterling Express Co.* (N.H. 1941) 22 A.2d 327, 328-329 (provisions required under N.H. laws (1937), Ch. 161, Section 17);

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NEW JERSEY: *Leitner v. Citizens Casualty Co. of New York,* 52 A.2d 687, 689 (N.J. App. 1997) (endorsement required for taxicab policies by Commissioner of Motor Vehicles under N.J.R.S., N.J.S.A., 48.16-3);

NEW MEXICO: *Lopez v. Townsend,* 82 P.2d 921, 932 (N.M. 1938) (endorsement for trucker policies required by Corporation Commissioner under N.M. laws (1929) Ch. 129, Section 1(d), (1929) Comp., Section 11-1005);

NORTH CAROLINA: *Textile Ins. Co. v. Lambeth,* 108 S.E.2d 36, 40 (N.C. 1959) (endorsement required by North Carolina Utilities Commission under N.C. Truck Act (1947) Section 19, N.C. Gen. Stats., Section 62-121.23);

NORTH DAKOTA: *Miller v. State Auto Ins. Assn.,* 21 N.W. 2d 621, 631-632 (N.D. 1976) (policy for common carrier authorized by Board of Railroad Commissioners under N.D. laws (1933), Ch. 164, Sections 2, 5, 6, 8; Section 26, as amended by N.D. laws (1935), Ch. 182);

OHIO: *Wood v. Vona,*68 N.E.2d 80, 83-84 (Ohio 1946) (Public Utilities Commission endorsement required under Ohio General Code, Section 614-104);

OKLAHOMA: *Tristate Ins. Co. v. Hobbs,* 347 P.2d 226, 228-229 (Okla. 1959) (motor carrier endorsement required by Corporations Commission (Ok. Corp. Commission Rule 23(d), Order No. 15639);

OREGON: *Duffy v. Oregon Auto Ins. Co.,* 211 P.2d 21, 212 (Or. 1933) (endorsement required for common carrier policy under Or. Gen. Laws (1925) p. 756, Ch. 380; Or. Code (1930), Section 55-1317);

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PENNSYLVANIA: *Hoar v. Gray,* 42 A.2d 822, 823 (Pa. 1945) (Public Utility Endorsement under 66 Pa. Stat., Sections 1101 et. seq., and 1102(6) (1939)];

SOUTH CAROLINA: *Watts v. Baker,* 105 S.E.2d 605 (S.C. 1958) (taxicab policy required by Public Service Commission and S.C. Code (1952), Section 10-702);

TENNESSEE: *Liberty Mutual Ins. Co. v. McDonald,* 97 F.2d 497, 498-499 (6th Cir. [Tenn.] 1938) (endorsement required by Public Utilities Commission for truckers policy under Code Tenn. (1932), Section 5483);

TEXAS: *Security Ins. Co. v. Pioneer Casualty Co.,* 449 S.W.2d 158, 159-160 (Tx. App. 1969) (Texas Railroad Commission Form 77, Motor Vehicle Endorsement for Truckers Policy);

VIRGINIA: *Reserve Ins. Co. v. Odham,* 125 S.E.2d 874 (Va. 1962) (endorsement to taxicab policy required under Va. Code, Title 56, Ch. 12 and Va. Code, Section 56-299 and 56-300 (1959) replacement Vol. 8, Code 1950);

WASHINGTON: *L.J. Dowell Inc. v. United Pacific Casualty Ins. Co.,* 72 P.2d 296, 301-302 (Wa. 1937) (motor freight carrier endorsements required under Wa. laws (1933) Ch. 166);

WEST VIRGINIA: *American Casualty Co. of Reading, PA v. Morris,* 51 F.Supp. 889, 892 (D.C. W. Va. 1943) [Public Service Commission Endorsement required under W. Va. Motor Carrier Law, Art. 5, Section 5(g)]

WISCONSIN: *Huset V. Milwaukee Dressed Beef Co.,* 174 N.W.2d 740, 743 (Wis. 1970) (endorsement for trucker policy required by Public Service Commission under Wis. Stats., Section 194.41).

(2)

Supreme Court, U.S.
FILED
JUL 17 1998
OFFICE OF THE CLERK

No. 97-2049

In The
Supreme Court of the United States

October Term, 1997

CONDOR INSURANCE COMPANY,
Petitioner,

vs.

LISA CHRISTINE ERIKSEN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN G. COHN
Law Offices of Steven G. Cohn
4333 Park Terrace Drive, Suite 200
Westlake Village, California 91361
(818) 735-0800

WILLIAM J. KOPENY
Counsel of Record
8001 Irvine Center Drive, Suite 1170
Irvine, California 92653
(714) 453-2243

Attorneys for Respondent, Lisa Christine Eriksen

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CONDOR INSURANCE COMPANY'S PETITION FOR REVIEW RAISES ISSUES WHICH WERE NOT PRESENTED TO THE LOWER COURTS AND CONTAINS MISSTATEMENTS.

Defendant/Appellant/Petitioner, CONDOR INSURANCE COMPANY (hereinafter referred to as "Petitioner" or "CONDOR"), has submitted a Petition for Review to this Court which is so replete with misrepresentations and inadmissible evidence that this Opposition was required.

This litigation has its inception in a truck vs. automobile accident (hereinafter referred to as "the underlying accident") between Plaintiff/Respondent, LISA CHRISTINE ERIKSEN (hereinafter "Respondent" or "Eriksen"), and William Joseph Schuler (hereinafter referred to as "Schuler" or "CONDOR's insured") which occurred on or about September 6, 1989. The accident was caused by Schuler when Schuler, driving a massive sand and gravel truck, made a right turn to get on to the Ventura Freeway (westbound) from the center southbound lane of Las Virgenes Canyon Road. Before Schuler executed this right turn, Eriksen was stopped at a red light in the far right southbound lane of Las Virgenes Canyon Road also waiting to make a right turn to get on to the Ventura Freeway (westbound). Abruptly, Schuler made a right turn in an effort to get onto the Ventura Freeway westbound on-ramp. Apparently Schuler did not see Eriksen's car. When Schuler made the right turn, Schuler's massive vehicle literally dragged Eriksen's stopped vehicle down the onramp, crushing it between the side of the massive sand and gravel truck and the freeway onramp guardrail.

As a result of the underlying accident, Eriksen's 1985 Ford Tempo automobile was severely damaged. Eriksen suffered, among other injuries, a serious injury to her back (including a herniated disc) which, to this day, still causes Eriksen constant, and sometimes disabling, pain. Eriksen also experiences numbness in her legs and other related problems.

CONDOR's Petition for Review makes reference to a police report which puts Eriksen at fault for the automobile accident. The police report not only constitutes inadmissible hearsay (and also is not relevant to the matters at issue in this case), the information in the police report directly contradicts the testimony of the actual percipient witnesses to the accident. Also, based upon the interplay between the officer and the scene of the accident and Schuler, it is believed that the officer and Schuler were long-time friends. CONDOR's claim that Eriksen was not injured in the accident is contrary to all medical evidence and is patently false.

At the time the underlying accident occurred, Schuler was employed as a truck driver by Quality Rock & Gravel Company (hereinafter referred to as "Quality Rock" or "CONDOR's insured") and was acting within the course and scope of his duties. Petitioner, CONDOR, was the insurer of Quality Rock and Schuler at the time the underlying accident occurred.

On or about November 22, 1989, Eriksen filed a Complaint in the Superior Court of the State of California, County of Los Angeles, Northwest District, entitled Lisa Christine Eriksen v. William Joseph Schuler, et al., Case Number NWC053623 (hereinafter referred to as "the underlying litigation") in which Eriksen sought an award of

damages for the injuries caused to Eriksen in the underlying accident. CONDOR's insureds were served with the Summons, Complaint and Statement of Damages in the underlying action.

Quality Rock was served by substituted service in the underlying litigation on or about June 20, 1991. Schuler was served by publication in the underlying litigation which became effective on or about December 13, 1991. As discussed below, although Schuler was served by publication, Schuler testified under penalty of perjury that he did in fact receive the Summons, Complaint and Statement of Damages mailed to him as part of the publication process. Neither Schuler or Quality Rock responded to Eriksen's Complaint in the underlying litigation.

It should be noted that, contrary to the representations made in CONDOR's Petition, although Eriksen was involved in four (4) different automobile accidents during an eleven (11) month period, there is no evidence that Eriksen suffered any significant physical injury in any of these automobile accidents other than the last accident which was caused by Schuler. Rather, all of these other accidents were included in Eriksen's Complaint in the underlying litigation to prevent Schuler and/or Quality Rock from raising the "empty chair" defense. All of Eriksen's claims against the other three (3) defendants named in the underlying litigation were settled for nominal amounts (i.e., for the amount to repair minor property damage done to Eriksen's car) or abandoned.

On February 4, 1993, the underlying action came on regularly for trial in the Superior Court for the State of California, County of Los Angeles, Northwest District, on the default calendar, the Honorable Robert M. Latteau, Judge Presiding. At trial, Judge Latteau gave judgment for

Eriksen and against Quality Rock and Schuler in the amount of $228,500.00.

As set forth below, Petitioner, CONDOR, was notified of the judgment against its insureds, at the latest, prior to December 3, 1993.

On January 12, 1994, Quality Rock (not CONDOR or attorneys provided by CONDOR on Quality Rock's behalf) moved to set aside the default judgment entered against it in the underlying litigation. Petitioner, CONDOR, refused to become involved in the underlying litigation. Quality Rock's Motion to Set Aside Default was denied on January 12, 1994. Quality Rock timely appealed the Court's denial of Quality Rock's Motion to Set Aside Default. Thereafter, Quality Rock declared bankruptcy and, ultimately, abandoned its appeal. CONDOR did not pursue the appeal and, in fact, intentionally refused to take part in the underlying litigation. On July 18, 1995, the appeal in the underlying litigation was dismissed for lack of prosecution. The Order of Dismissal became final on September 20, 1995.

The Motion to Set Aside Default in the underlying litigation was brought by Quality Rock only. Schuler was not a party to said Motion to Set Aside Default and did not join in Quality Rock's Motion to Set Aside Default. In fact, even if Schuler wanted to set aside the judgment in the underlying litigation, any Motion to Set Aside the Default brought by Schuler would have been futile. In this regard, Schuler testified that Schuler had in fact received the Summons, Complaint and Statement of Damages mailed to him in the underlying action as part of the publication process.

As set forth above, CONDOR was first notified of the underlying accident and the underlying litigation, at the latest, prior to December 3, 1993 by its insured, Quality Rock. Nonetheless, CONDOR did not even: attempt to set aside the default entered against its insureds in the underlying litigation; pursue the appeal in the underlying litigation; intervene in the underlying litigation; undertake to defend its insureds in the underlying litigation; or, do anything else to protect its insured's interests in the underlying litigation. Rather, CONDOR completely sacrificed its insureds to protect its own interests. In fact, even though CONDOR had notice of the judgment against its insureds in the underlying litigation, at the latest, prior to December 3, 1993, CONDOR steadfastly refused to take any action with regard to the underlying judgment until July 1994 when Plaintiff attempted to collect that judgment directly from CONDOR[1].

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[1] When Respondent began to pursue collection of the judgment from CONDOR, a Motion was filed by CONDOR on September 29, 1995 to set aside the default in the underlying litigation pursuant to Jade v. Viguri (1989) 210 Cal.App.3d 1459. This motion would not relieve Quality Rock or Schuler from the default judgment. However, CONDOR as an insurer would then have been able to litigate the underlying judgment on its merits. With regard to CONDOR's motion to set aside in the underlying litigation, CONDOR states that CONDOR's Motion to Vacate/Intervene in the underlying litigation was taken off-calendar "because of Quality Rock's bankruptcy." This statement is obviously false. The automatic stay in bankruptcy

Although Quality Rock and Schuler were insured by CONDOR under CONDOR's policy of common carrier automobile insurance (hereinafter referred to as "the policy") when the underlying accident occurred, CONDOR refused to participate in the underlying litigation "because its insureds failed to notify CONDOR that they had been served with the Summons and Complaint in the underlying litigation and, therefore, CONDOR had no obligation to pay the final judgment in the underlying litigation." CONDOR admits that when CONDOR made this tactical decision not to participate in the underlying litigation, CONDOR did not realize that pursuant to Public Utilities Commission of the State of California, General Order No. 100 Series, by issuing the policy in the State of California, CONDOR agreed "to pay any final judgment" rendered against CONDOR's insureds even if CONDOR's insureds breached the policy by failing to notify CONDOR about the underlying accident.

By the time CONDOR realized that it would have to pay any final judgment entered against its insureds whether or not CONDOR had notice of the underlying litigation, CONDOR's avenues of legal recourse were quite limited and

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resulting from Quality Rock's bankruptcy filing would not, and could not, affect CONDOR's motion to set aside the judgment in the underlying litigation because CONDOR was not pursuing the collection of a judgment against Quality Rock. More importantly, Schuler was not in bankruptcy so CONDOR could have still pursued its motion to set aside default judgment using Schuler as the underlying defendant without regard to Quality Rock's bankruptcy.

the only way CONDOR could avoid paying the judgment was to somehow show that the underlying judgment was "void on its face" or "was the result of fraud, mistake or collusion."[2] In a desperate attempt to come up with some defense to this litigation, CONDOR concocted the argument which CONDOR pursued in state court -- that the judgment entered against Quality Rock and Schuler was void in its face because "due process" requires a more specific Statement of Damages than the one which was served on Quality Rock and Schuler. However, because there was no law or evidence to support this spurious and bad faith attempt by CONDOR to avoid its statutory and contractual obligations as an insurer of common carriers, the trial court granted Eriksen's Motion for Summary Judgment/Summary Adjudication regarding this defense.

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[2] Because CONDOR was unable to come up with any evidence indicating that Respondent was engaged in any "fraudulent" or "collusive" conduct, CONDOR abandoned this defense.

With regard to all of the above, it is rather ironic that only now, after CONDOR's own assets have been threatened, does CONDOR claim with indignity that the "due process" rights of its insureds have been violated -- people whose rights CONDOR declined to protect even though those people paid CONDOR between $5,000.00 and $8,000.00 per month for insurance for over four years. Respondent submits that if CONDOR was truly concerned with the "due process" rights of its insureds, CONDOR would have assumed the defense of its insureds and participated in the underlying litigation.

It should also be noted that CONDOR was also precluded from having the trial court exercise its equitable jurisdiction to grant CONDOR relief from the judgment in the underlying litigation because CONDOR did not "exhaust its legal remedies" by pursuing the underlying litigation.

It should also be noted that CONDOR was not diligent in its efforts to obtain equitable relief from the judgment in the underlying litigation.

On the other hand, Eriksen will clearly suffer extreme and irreparable prejudice if CONDOR is granted equitable relief from the judgment in the underlying litigation. In this regard, if CONDOR had intervened in the underlying litigation on or about December 3, 1993 (the latest date on which CONDOR received notice of the underlying litigation) and had at least attempted to obtain relief from the default in the underlying litigation, a judgment in the underlying litigation would have necessarily been rendered by now. However, as a result of CONDOR's dilatory tactics, if CONDOR is granted relief from the judgment in the underlying litigation (and Petitioner is somehow given the opportunity to litigate the claims raised

in the underlying litigation), Eriksen will be forced to carry the burden of proof as to matters which occurred more than seven (7) years ago.

CONDOR essentially seeks to do what the California Supreme Court condemned in Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal.3d 778 wherein the court specifically stated at page 778:

> "Recognizing 'the serious need to update California's jurisdiction and service of process statutes' the California Judicial Council and State Bar, following a joint study, recommended a comprehensive revision of the California statutes. The suggested changes, including Section 416.10, which governs service upon corporations, were enacted by the 1969 legislature. Although some decisions under pre-1969 statutes required strict and exact compliance with the statutory requirements, the provisions of the new law, according to its draftsmen 'are to be liberally construed ... as stated in the November 25, 1968, Report of the Judicial Council Special Committee on Jurisdiction, page 14-15: 'The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the Court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint ...'. The liberal construction rule, it is anticipated, will eliminate unnecessary, time consuming, costly disputes over legal

technicalities, without prejudicing the rights of defendants to proper notice of court proceedings.'

The case at bar demonstrates the desirability of liberal construction of the new statutes. Defendants here had their opportunity to press the merits of any possible defense; they presented none; they actually have none. Recognizing their liability, they deliberately decided to permit plaintiff to obtain the default judgment. Yet they now seek to invoke a technical defect in service to set aside the judgment, not to present a defense, but, by vacating the judgment, can nullify plaintiff's lien upon the last remaining asset of the corporation and thereby leave plaintiff powerless to collect and acknowledge debt." (Emphasis added.)

The court in Pasadena Medi-Center, supra, then goes on to state that the equitable principles such as estoppel and laches "sweep across the civil law" and that there is absolutely "no reason to depart from these principles merely because the issues involved concern service of process".

In this case, CONDOR could have promptly assumed the defense of its insureds in the underlying litigation immediately after CONDOR was notified of the underlying litigation on December 3, 1994. Alternatively, CONDOR could have intervened in the underlying litigation after CONDOR learned of the underlying litigation on December 3, 1994. Or, CONDOR could have done both just as the insurer did in Jade v. Viguri (1989) 210 Cal.App.3d 1459. However, CONDOR did not choose any of these

alternatives. Rather, CONDOR chose to attack the judgment in the underlying litigation in this case after the judgment in the underlying litigation became final thereby "invoking a technical defect in service to set aside that judgment, not to present a defense, but, by vacating the judgment, to leave plaintiff powerless to collect an acknowledged debt" -- the exact procedure which the California Supreme Court condemned in Pasadena Medi-Center, supra. This is also the type of conduct which the California legislature sought to prevent by requiring that all policies of commercial common carrier insurance issued in the State of California include a standard form endorsement providing that the insurer "will pay any final judgment against its insured."

It should be noted that the trial court's factual determination that CONDOR delayed too long before CONDOR made any effort to protect CONDOR's own rights or the rights of CONDOR's insureds is typically a factual determination left to the sound discretion of the trial court. Additionally, given the duration and intentional nature of CONDOR's delay in this case, there can be no doubt that CONDOR's delay was excessive "as a matter of law." Similarly, the determination as to whether the trial court should exercise its equitable powers to relieve CONDOR from the default judgment against CONDOR's insureds in the underlying litigation is a matter left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion (see Eisenberg, Horvitz and Weiner, California Practice Guide: Civil Appeals and Writs (TRG 1997) at §8:93 et seq.).

Based on the above, CONDOR is precluded, by its own intentional conduct, from obtaining relief in this litigation from the judgment against CONDOR's insureds in the underlying litigation.

It is also critical to not that CONDOR never questioned the constitutionality or the validity of the those provisions of California law requiring an insurer of common carriers to pay final judgment against its insured, even if the insured conceals the claim from the insurer (see California Court of Appeal decision in CONDOR's Petition for Review, Appendix B, page 4a, footnote 2; and page 59). Because CONDOR did not raise this issue on appeal or in its Petition to the California Supreme Court, CONDOR cannot raise that issue now. Nonetheless, CONDOR's misleading Petition for Review to this Court does in fact attempt to raise this issue.

Similarly, CONDOR alludes to the fact that the judgment against it was somehow "fraudulent" or "collusive." However, CONDOR was unable to come up with any evidence in support of this defense and CONDOR in fact abandoned this defense.

CONDOR's claims that CONDOR's constitutional rights have been violated are completely without merit. In this regard, the only issue CONDOR raised on appeal was the sole issue of whether or not CONDOR could avoid paying the final judgment rendered against its insured on the ground that the Statement of Damages served by Eriksen in the underlying litigation was insufficient. The California Court of Appeal did not mince words in affirming the trial court's decision. Now CONDOR, in an attempt to further avoid its obligations as an insurer of a Common Carrier, submits a Petition to this Court full of misrepresentations, inadmissible evidence and issues which were never raised in the lower courts.

CONCLUSION

CONDOR's Petition for Review should be denied.

Respectfully submitted,

Of Counsel:
STEVEN G. COHN
Law Offices of Steven G. Cohn
4333 Park Terrace Drive, Suite 200
Westlake Village, California 91361
(818) 735-0800

WILLIAM J. KOPENY
Counsel of Record
8001 Irvine Center Drive
Suite 1170
Irvine, California 92653
(714) 453-2243

Attorneys for Respondent,
Lisa Christine Eriksen

(3)

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In The

Supreme Court of the United States

October Term, 1997

CONDOR INSURANCE COMPANY,

Petitioner,

vs.

LISA CHRISTINE ERIKSEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GREGORY F. STANNARD
Law Offices of Gregory F. Stannard
200 Corporate Point, Suite 125
Culver City, California 90230-8721
(310) 642-6980

LARRY A. ROTHSTEIN
Attorney at Law
21700 Oxnard Street, Suite 960
Woodland Hills, California 91367-3642
(818) 716-2662

HARRY W.R. CHAMBERLAIN II
Counsel of Record
MARTHA A. SHEN
GINSBURG, STEPHAN, ORINGHER & RICHMAN
A Professional Corporation
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067-4012
(310) 557-2009
Attorneys for Petitioner Condor Insurance Company

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SUPPLEMENTAL APPENDIX N—PETITION FOR REVIEW FILED JANUARY 29, 1998, LISA CHRISTINE ERIKSEN VS. CONDOR INSURANCE COMPANY, California Supreme Court Case No. S067653 (excerpted) 100a

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SUMMARY OF REPLY ARGUMENT

The Brief in Opposition of Respondent Eriksen argues that the Petition raises "issues which were not presented to the lower courts and contains misstatements [of fact]." (Brief in Oppos. at p. 1.) Her argument is unfounded. To dispel Eriksen's misapprehension about the issues actually raised, Condor lodges herewith the certification of the California Supreme Court of its records setting forth the specific "Issues Presented" by Condor in that court. Accordingly, the questions posed in the pending Petition for Certiorari were raised and passed upon by California's highest court when it twice denied review in the underlying proceedings. (See Section II.A. at pp. 2-5, *infra.*)

Moreover, each of the factual statements contained in the Petition for Certiorari is supported by an appropriate reference to the record in the Appendix. By contrast, Eriksen's unsupported assertion—without reference to the record—that the facts stated by Condor are "patently false" merely underscores that legitimate disputes exist regarding the merits of the liability and damages issues arising out of all five of her separate accident claims; for example, her claims have now expanded to include a "severely damaged" automobile which she did not own, and was not identified in her Statement of Damages. (Brief in Oppos. at pp. 2-3.) Eriksen herself acknowledges that, but for the Common Carrier endorsement, a liability insurer in Condor's position would have standing (either as an intervenor in the underlying lawsuit *or* as a defendant in her subsequent "direct action" for collection on the policy) to contest her claims on the merits. Condor employed *both* alternative procedures; timely raising the constitutional challenges to the validity of the default judgment she procured against its insureds, and the enforceability of that judgment in the present action on its insurance policy. (See, e.g., *id.* at pp. 2, 4-6 & fn. 1; see also Section II.B. at pp. 5-8, *infra.*)

Eriksen next erroneously maintains that her unsegregated Statement of Damages pertaining to all five accidents may be "liberally construed" consistent with due process. Her position

is contrary to controlling authority, including the most recent decision of the California Court of Appeal to interpret the Statement of Damages statute. *Surgin Surgical Instrumentation, Inc. v. Truck Ins. Exch.*, 64 Cal.App.4th 1409, 1418-1420, 76 Cal.Rptr.2d 303, 307-310 (June 23, 1998) vacated a $57 million default judgment in an action against an insurance company, owing to the plaintiff's failure to strictly comply with the constitutional requirement of providing a precise statement of the damages it was seeking before the entry of default. This recent case further illustrates the magnitude of the constitutional deficiencies inherent in allowing Eriksen's default judgment to be given *res judicata* effect against Condor— without prior notice of the underlying liability action or an opportunity to dispute the merits of her claims. (See Section II.C. at pp. 8-10, *infra.*)

Certiorari should be granted to provide guidance to the courts of California, and other jurisdictions with similar insurance regulations, regarding the proper application of the Due Process Clause to the procurement of default judgments, and the enforceability of such judgments against third party liability insurers.

ARGUMENT

A. Contrary To Eriksen's Opposition, The Certified Records Of The California Supreme Court Establish That Condor Timely Raised The Constitutional Issues Set Forth In The Petition

Eriksen asserts that Condor "never questioned the constitutionality or validity" of the insurance regulations which she asserted in the California courts below should have preclusive effect in binding Condor to pay the default judgment against its insureds. (Brief in Oppos. at p. 12.) She further contends that Condor did not "exhaust its legal remedies" by pursuing the underlying litigation to conclusion (after the entry of the default judgment) and that its arguments are limited to whether that judgment was the product of fraud or collusion. (*Id.* at pp. 6-8, 12.)

Not so. The accompanying records certified by the California Supreme Court set forth the "Issues Presented" in Condor's two Petitions for Review that were passed upon by California's highest court. Both of Condor's submissions in the California Supreme Court challenged whether Eriksen's default judgment against its insureds was constitutionally "void on its face" for failure to specify the precise damages she was claiming as the result of her fifth, and last, accident with Quality Rock's cement truck. (Condor's Petition for Review filed Dec. 22, 1995, Supp. App. M at pp. 96a-99a appended hereto; Condor's Petition for Review filed Jan. 29, 1998, Supp. App. N at pp. 100a-104a.)[1]

Condor's applications to the California Supreme Court also questioned the applicability and validity of *Home Indemnity v. King,* 34 Cal.3d 803, 670 P.2d 340 (1983). *Home Indemnity* interpreted the same insurance regulations (PUC General Order No. 100 and Cal. Ins. Code §11580) which are the

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[1] Condor is certainly surprised that Eriksen would attempt in the face of this record to deny that the constitutional questions pending before this Court were, in fact, "presented" in the courts below. Rule 28(e)(2) of the California Rules of Court requires that at "the beginning of the body of the petition [for review in the California Supreme Court], the petition shall state ***the issues presented for review***, expressed in the terms and circumstances of the case..." (Emphasis added.) While the California Supreme Court "has taken the position that it is "powerless for want of jurisdiction' to issue a certificate" in the form a separate statement attesting that "Federal questions" were raised, the Clerk of that court has attested and certified the contents of the petitions filed by Condor containing the precise issues raised therein. R. STERN, ET AL., SUPREME COURT PRACTICE, §3.19 at pp. 133-134 (7th ed. 1993) citing *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947) ("both the judgment and the opinion *as well as other circumstances* which may be pertinent" are subject to review to determine issues raised and finality of the judgment below) (emphasis added). Excerpts of the certified records of the California Supreme Court (served and lodged herewith) are reprinted in the Supplemental Appendix at the end of this Brief.

subject of the petition before this Court.[2] Despite the absence of actual notice of Eriksen's underlying action against its insureds (Quality Rock and Schuler), the superior court enforced the judgment under Condor's policy. Relying upon *Home Indemnity*, the trial court reasoned that due to the PUC endorsement Condor's ability to contest enforcement of the default judgment was limited to a "finding of extrinsic fraud or mistake, [otherwise] the defendant insurance company is liable on the judgment." (Petition for Cert., App. C at p. 13a; App. B at pp. 4a-5a & fn. 3, pp. 8a-9a.) The decision of the Court of Appeal affirming the trial court only addressed the first issue; namely, whether the default judgment was void on its face as a result of the unsegregated Statement of Damages (*id.*, App. B at pp. 5a-8a). Its opinion ignored, without discussion, the second and equally compelling constitutional question of whether collateral estoppel effect could be given to the default judgment consistent with Due Process in Eriksen's subsequent "direct action" for enforcement under the insurance policy.

Thus, Condor raised at the earliest opportunity—in the California Supreme Court—whether that court's *Home Indemnity* decision and the applicable California insurance regulations could be read so expansively. (Supp. App. N at pp. 102a-104a; see also Petition for Cert. at p. 27, fns. 22-23.) Obviously, because the lower California courts would be bound by the California Supreme Court's precedent in *Home Indemnity*, "it would therefore have been pointless to raise the issue there." *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 6-7, 954 P.2d 511, 514 (1998) (internal citations omitted). The issues presented in this case were timely raised

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[2] Condor's December 1995 Petition for Review followed the denial of a statutory writ of mandate by the California Court of Appeal after the trial court granted summary adjudication of the validity of Eriksen's default judgment. (See Petition for Cert. at p. 9 & fn. 7.) The second Petition for Review followed the regular appellate process; i.e., raising substantially the same issues after the Court of Appeal had rendered a written opinion following entry of judgment in the trial court. (*Id.*at pp. 10-11.)

in the state courts and are properly before this Court. 28 U.S.C. §§ 1257(a), 2101(c).

B. The Factual Statements Contained In The Petition Are Supported By The Appended Court Records—Any Contrary Facts Asserted By Eriksen Demonstrate That There Exists At Least A Legitimate Dispute Regarding The Merits Of Her Claims Which Constitutionally Precluded Enforcement Of The Default Judgment Under Condor's Policy Without Prior Notice And The Opportunity To Defend The Underlying Lawsuit

Regrettably, the Brief in Opposition resorts to unwarranted personal attacks on Condor and its counsel, asserting that the Petition's factual statements are the product of "misrepresentations and inadmissible evidence . . . ." (Cf. Brief in Oppos. at pp. 1, 12.) See U.S. Supreme Court Rule 24.6; STERN, ET AL., SUPREME COURT PRACTICE, § 13.11(j) at p. 554. Each fact contained in the Petition is supported by an appropriate reference to the record below. Indeed, the police report (which Eriksen characterizes as "inadmissible hearsay") was submitted in evidence in the superior court by the declaration of her own attorney. (Petition for Cert., App. J at 68a-76a.) By contrast, Eriksen's contention that *her* "1985 Ford Tempo automobile was severely damaged" and that "all medical evidence" established that she suffered substantial and permanent injuries in the accident with William Schuler are not supported by any citations to the "record." (Brief in Oppos. at pp. 2-4.) Neither is her speculation that "it is believed that the [investigating] officer and Schuler were longtime friends." (*Id.* at p.3.) The reason is simple: There was *no record* of the evidentiary support she submitted to obtain her judgment in excess of $228,000 against Condor's insureds because there never was a contested trial on the merits.[3]

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[3] Eriksen's unsegregated Statement of Damages contained no claim for the damage to *her* Ford Tempo automobile. (Petition for Cert. at pp. 5-6; App. H at pp. 42a-43a.) According to the police

(footnote continues)

Condor does not suggest that this Court become the ultimate arbiter of disputed "facts." The factual contentions raised in opposition to the Petition well illustrate the fundamental principles that lie at the heart of the Due Process requirements of notice and the opportunity to be heard: "The policy of the law [which] favors determination on the merits, not by default." *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 31 Cal.App.4th 1481, 1488, 37 Cal.Rptr.2d 575, 579 (1995).

The *salient facts* are not in substantial dispute:

> Eriksen's pre-printed "form complaint" and her Statement of Damages sought recovery for the personal injuries she allegedly suffered in five separate and distinct accidents between 1988 and 1989. (Petition for Cert. at 4-5; App. H at pp. 33a-41a.)
>
> Over three years passed before the default judgment was taken against Schuler and Quality Rock, and that judgment was entered *nine months* before notice of Eriksen's lawsuit was first received by Condor in December 1993—outside the six month statutory time limit for relief from default under California Code of Civil Procedure § 473. (Petition for Cert. at pp. 7-8; App. I at pp. 53a-54a; App. J at pp. 68a-69a.)[4]
>
> Eriksen maintained that the regulatory scheme relating to Common Carrier insurance precluded Condor from contesting the merits of her default judgment because it was "final." (See Brief in Oppos. at 7, 12.)

(footnote continued)

report submitted in evidence by her counsel, the car she was driving was a rental owned by a company called Wheels Inc., and that "owner" made a claim directly to Quality Rock for reimbursement of the property damage to *its* automobile. (*Id.*, App. J at p. 70a; see also Patricia Lombardo Decl., ¶¶ 7-8 at pp. 62a-63a.)

[4] The passage of more than seven years since the filing of Eriksen's underlying action is a delay of her own making. At all times after receiving notice of that lawsuit, Condor was and still is prepared to litigate Eriksen's claims on their merits.

> By virtue of the PUC endorsement attached to its policy, the California courts concluded that the default judgment would be given res judicata effect in the action to collect on Condor's policy because its motion to vacate the default "was required to comply with the time limits set forth in Code of Civil Procedure section 473, subdivision (b)"; i.e., within six months from the entry of the judgment. (Petition for Cert., App. B at p. 8a; App. C at p.13a; see also Petition for Cert. at pp. 21-22 & fn. 16.)

Eriksen mistakenly asserts that "Condor refused to participate in the underlying litigation," and that the only method of vacating the default judgment was for Condor to assume Quality Rock's appeal from the default judgment. (Brief in Oppos. at pp. 5-6 & fn. 1.) One of several alternative remedies available to an automobile liability insurer is to intervene to set aside the default where its policy may ultimately be liable on the judgment. (Petition for Cert. at pp. 19-20; 8 B. WITKIN, CAL. PROCEDURE, *Attack On Judgment In Trial Court,* § 218 at p. 721 (4th ed. 1997).) Where an insurance company does so, however, it is essentially requesting declaratory relief regarding a contingent future liability. Alternatively, the carrier may await the subsequent "direct action" to garnish the proceeds of its insurance policy in satisfaction of the default judgment and raise challenges to its validity at that time. *Wright v. Fireman's Fund Ins. Cos.*, 11 Cal.App.4th 998, 1019, 14 Cal.Rptr.2d 588, 594 (1992). (Petition for Cert. at pp. 23-27; see also Supp. App. N at pp. 102a-104a.) In the present case, there would have been no purpose served by Condor continuing to pursue a duplicative "motion to vacate" in the original action—Quality Rock had declared bankruptcy and Eriksen's "direct action" against Condor was already underway. Contrary to her views, California procedure does not require that the remedy of a motion to vacate in the original action be exhausted before challenges to the default judgment can be raised in subsequent proceedings: "The remedies are distinct and cumulative." See 8 B. WITKIN, CAL. PROCEDURE, §§ 219-220 at pp. 722-723.

At a minimum, Eriksen's disputed "facts" suggest several potentially meritorious defenses existed to her claims—against Condor's insureds and in her subsequent collection action. But even if that were not so, Due Process would still entitle Condor as a non-party without notice of the prior action to contest the default judgment: "Where a person has been deprived of property in a manner contrary to the most basic tenants of due process, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988). Condor has such defenses, and is constitutionally entitled to assert them.

C. California's Most Recent Reported Decision Interpreting The Statement Of Damages Requirement Rejects Eriksen's "Liberal Construction" Argument On Due Process Grounds

Eriksen's "liberal construction" argument likewise fails to pass constitutional muster. (Brief in Oppos. at pp. 9-10.) The most recent California decision to interpret the "codified due process" protection of a separate statement of damages directly refutes her claim. *Surgin Surgical Instrumentation, Inc. v. Truck Ins. Exch.*, 64 Cal.App.4th 1409, 76 Cal.Rptr.2d 303 (June 23, 1998) was decided barely a week after this Petition was filed. Surgin purchased a liability policy from Truck, and thereafter became embroiled in a lawsuit with one of its competitors. Truck declined to defend, and Surgin ultimately settled the competitor's lawsuit on allegedly "unfavorable terms." The insured thereafter sued Truck for breach of contract and bad faith. During the course of the coverage litigation, Truck engaged in wilful discovery misconduct by failing to turn over documents in violation of court orders.

As a discovery sanction, the trial court entered Truck's default and at a "prove-up" hearing awarded Surgin compensatory and punitive damages in excess of $57 million. The California Court of Appeal reversed the judgment on due process grounds—the failure to serve an itemized statement of damages, "specify[ing] a dollar amount." 64 Cal.App.4th at

1416-1418, 76 Cal.Rptr.2d at 307-308. The notice and specificity requirements of the statement of damages procedure "are of constitutional dimension." *Ibid.*

Surgin unsuccessfully argued that Truck had "constructive notice" of the amount of damages it was claiming because, as a party to the action, that information had been provided during discovery and in settlement demands sent to its counsel before entry of default exceeding $60 million. The *Surgin* court held these due process protections were not satisfied:

> It is not clear whether Surgin is seeking $825,000, $2-3 million, or $62 million in damages. The purpose of requiring notice to the defendant of the damages sought is to provide the defendant with " 'one last clear chance' to respond to the allegations of the complaint and to avoid the ***precise consequences*** ... of a judgment for a substantial sum ... without any actual notice of ... potential liability." 64 Cal.App.4th at 1419-1420, 76 Cal.Rptr.2d at 309 (internal citations and brackets omitted; emphasis added).

If the deficient notice of damages required vacatur of the default judgment against an insurer in the position of Truck, an insurer participating as a *party* in coverage litigation, the constitutional deficiencies that precluded Condor (a non-party to the prior action) from contesting the merits of Eriksen's default judgment are manifest.[5] Indisputably, Condor had no notice of Eriksen's lawsuit (much less a specific Statement of Damages), until more than four years after the action was filed, and three months after the statutory time limit to set aside the default expired. The *offensive use* of collateral estoppel under the

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[5] *Pasadena Medi-Center Associates v. Superior Court*, 9 Cal.3d 773, 511 P.2d 1180 (1973) is inapposite. The quoted language in the Brief in Opposition makes clear that the California Supreme Court was addressing liberal construction of service of process statutes where "*actual notice has been received by the defendant* ..." (Brief in Oppos. at p. 9 [emphasis added].) As Condor received no notice, and was denied the opportunity to contest the merits of the claim, it cannot be bound by the default judgment.

circumstances violates the Due Process Clause. (Petition for Cert. at pp. 23-27; *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 238, 636 P.2d 32, 43 (1981) ("an insurer is not bound by a judgment unless it had notice of the pendency of the action").)

Permitting Eriksen to collect the default judgment from Condor calls to mind the Red Queen's decree from a favorite children's tale: "*Sentence first—verdict afterwards.*" LEWIS CARROLL, ALICE IN WONDERLAND, Ch. 12. Yet according to the interpretation the California courts have given to the PUC endorsement in this case, there will never be a verdict—nor even a trial—on the merits of Eriksen's claims in her collection action against Condor. That outcome cannot be reconciled with any principled application of the "minimum" constitutional protections steadfastly maintained by the precedents of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:
GREGORY F. STANNARD
200 CORPORATE POINT,
SUITE 125
CULVER CITY, CA 90230-8721
(310) 642-6980

LARRY A. ROTHSTEIN
21700 Oxnard Street
Suite 960
Woodland Hills, CA
91367-3642
(818) 716-2662

HARRY W.R. CHAMBERLAIN II
Counsel of Record
MARTHA A. SHEN
GINSBURG, STEPHAN,
ORINGHER & RICHMAN, P.C.
10100 Santa Monica Blvd.,
8th Floor
Los Angeles, CA 90067-4012
(310) 557-2009

Attorneys for Petitioner
Condor Insurance Company

**SUPPLEMENTAL APPENDIX
IN SUPPORT OF JURISDICTIONAL STATEMENT**

SUPPLEMENTAL APPENDIX M—PETITION FOR REVIEW FILED DECEMBER 22, 1995, CONDOR INSURANCE COMPANY VS. LOS ANGELES COUNTY SUPERIOR COURT, California Supreme Court Case No. S050791 (excerpted)

[Pages 1-2:]

In the Supreme Court

of the

State of California

CONDOR INSURANCE COMPANY
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES
Respondent.

LISA CHRISTINE ERIKSEN,
Real Party in Interest.

PETITION FOR REVIEW

I.
ISSUES PRESENTED

1. Whether the due process clauses of the state and federal Constitutions (Cal. Const., art. I, § 7; U.S. Const. Amend. 14, § 1) require that an itemized Statement of Damages be provided to a defendant who is served by publication (or means other than personal service) prior to the entry of a default and default judgment against that defendant?

2. Whether a default judgment taken against a defendant pursuant to a complaint that includes five separate causes of action against five separate defendants arising out of five separate motor vehicle accidents (each occurring on different dates and at different locations) violates due process where the Statement of Damages served upon the defaulted defendant contains only one unsegregated demand relating to all alleged general and special damages for all five accidents?

3. Whether an insurance company whose defendant-insured fails to transmit a lawsuit resulting in the entry of a default judgment, and whose now-bankrupt insured never advises the insurer of the default judgment thereby allowing the time to challenge that judgment under Code of Civil Procedure § 473 to expire, may nevertheless be precluded from challenging the judgment as constitutionally void in a subsequent action brought by the plaintiff-judgment creditor?

II.
WHY REVIEW SHOULD BE GRANTED

By this Petition, Condor Insurance Company ("Condor") seeks the resolution of important questions of constitutional dimension regarding the applicable standard for entry of default judgments against non-appearing defendants, and the corresponding right of a liability insurer for the defaulted defendant to subsequently challenge a constitutionally void judgment taken against its insured in a later action brought by the plaintiff-judgment creditor under Insurance Code § 11580.

* * *

[IV.
LEGAL ARGUMENT

Pages 18-20:]

Eriksen's reliance upon Home Indemnity Co. v. King (1983) 34 Cal.3d 803 is misplaced, and the trial court's adoption of Eriksen's position based upon that case was mistaken. Home Indemnity involved consolidated actions to determine the liability of two insurance companies with regard to a truck-and-trailer rig driver injured during loading operations by a forklift operator. The Court's opinion held that the trial court erred in declaring the insurer not bound by a stipulated judgment because the provisions of a PUC endorsement in the truck owner's policy contained "specific language guaranteeing payment of a *final judgment* obtained against its insured." Id. at 815-816. Eriksen contends that Home Indemnity stands for the proposition that Condor is precluded as a matter of law from challenging the default judgment. Not so.

Supp. Appendix M

Nothing in Home Indemnity supports the contention that the truck owner (Quality Rock), the truck driver (Schuler) or their liability insurer (Condor) in their stead is precluded from challenging a default judgment that was *void from the face of the record* due to violation of constitutional due process standards in its procurement. See Schwab, supra, 53 Cal.3d at 434-435; Parish, supra, 1 Cal.App.4th at 207-208, 210-212.

* * *

"All of the cases in which a judgment *not on the merits* has been found binding on an insurer were based upon the principle an insurer *who has an opportunity to defend* and wrongfully

fails to do so is liable on the judgment against the insured." Wright v. Fireman's Fund Ins. Cos. (1992) 11 Cal.App.4th 998, 1019 (emphasis added). [* * * footnote deleted.]

Because Condor had no opportunity to defend its insureds, the summary adjudication order unconstitutionally deprived Condor of its right to contest an invalid judgment. As illustrated by the trial court's decision, confusion still reigns regarding the enforceability of default judgments entered without notice to liability insurers, and review is warranted to clarify these perplexing questions for liability insurers such as Condor.

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*** * * DENOTES TEXT DELETED. BRACKETED TEXT ADDED.**

SUPPLEMENTAL APPENDIX N—PETITION FOR REVIEW FILED ANUARY 29, 1998, LISA CHRISTINE ERIKSEN VS. CONDOR INSURANCE COMPANY, California Supreme Court Case No. S067653 (excerpted)

[Pages 1-2:]

In the Supreme Court

of the

State of California

LISA CHRISTINE ERIKSEN
Plantiff and Respondent,

VS.

CONDOR INSURANCE COMPANY
Defendant and Appellant.

PETITION FOR REVIEW

I.
ISSUES PRESENTED

1. In a "direct" action brought by a third party under Insurance Code § 11580, do the Due Process clauses of the State and Federal Constitutions and fundamental notions of fairness require that Appellant Condor Insurance Company ("Condor") be entitled to challenge enforcement of a constitutionally void judgment obtained against its insureds, as any other insurance company, individual or other entity would have the right to do?

2. By *"liberally construing* respondent's statement of damages [under §425.11]" including that the plaintiff's unsegregated demand for $750,000 in general damages and other damages according to proof against five (5) named defendants and Does 1 to 100, arising from five (5) separate and unrelated accidents against alleged tortfeasors who would be severally) (**not** jointly and severally) liable was constitutionally sufficient, does the Court of Appeal's decision conflict with this Court's decisions in Greenup v. Rodman (1986) 42 Cal.3d 822, and Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428 and better reasoned decisions of other Courts of Appeal (i.e., Parish v. Peters (1991) 1 Cal. App. 4th 202), which hold that the procedural requirements for obtaining entry of default judgment are to be **strictly construed** for the purposes of ensuring that minimum standards of Due Process are satisfied?

3. Did the Court of Appeal deny Condor its Due Process rights to defend the action brought by Plaintiff Lisa Christine Eriksen ("Eriksen") under Insurance Code §11580 by erroneously concluding that Condor's collateral attack on a void default judgment obtained by Eriksen against Condor's insureds in a prior litigation was untimely under Code of Civil Procedure §473 even though Condor did not even learn of the default judgment obtained against its insureds until **more than nine months after** that default judgment was entered?

II.
WHY REVIEW SHOULD BE GRANTED

By way of this Petition, Condor seeks the resolution of important questions of constitutional dimension regarding the applicable standard for entry of default judgments against non—appearing defendants, and the corresponding right of a liability insurer for the defaulted defendants to challenge in a subsequent action brought by the plaintiff-judgment creditor under Insurance Code § 11580 a constitutionally void judgment taken against its insureds.

* * *

[IV.
LEGAL ARGUMENT

Pages 16-18:]

Home Indemnity cannot be read so expansively as to preclude consideration of a carrier's notice and opportunity to be heard before there is a determination that a prior judgment has conclusive res judicata or collateral estoppel effect against that carrier in a separate proceeding. To do so would be to ignore this Court's decision in Samson v. Transamerica Ins. Co (1981) 30 Cal.3d 220. In Samson, this Court recognized "[t]he "general rule' that an insurer is not bound by a judgment unless it had notice of the pendency of the action . . . " in a case involving the very issue presented here, the liability to a third party claimant on a judgment obtained against the carrier's insured where the insurer's policy contains a PUC endorsement in the form mandated pursuant to P.U.C. General Order No. 100. Samson, 30 Cal.2d 224-229, 239 (citing Clemmer, *supra,* 22 Cal.3d 865).

As opposed to concluding, as the Superior Court did at Eriksen's urging in this case, that the existence of the PUC

endorsement by itself precluded any discussion of the carrier's right to notice and an opportunity to challenge the judgment obtained against its insureds, this Court in Samson specifically held that Transamerica was bound by the judgment both because it had actual notice of the accident and the lawsuit against its insured, *and* because it refused to defend its insured in the litigation and wrongfully rejected a reasonable settlement offer in the case. Samson, 30 Cal.3d at 237-239. For those reasons, this Court determined that ". . . 'it cannot now claim prejudice or lack of opportunity to litigate damages.' " Samson, 30 Cal.2d at 239 (quoting Clemmer, *supra*, 22 Cal.3d at 886).

Samson is thus consistent with Pacific Estates and Pruyn, the latter of which cases address policies *without* PUC endorsements. It is not violative of due process to apply principles of collateral estoppel or res judicata to bind an insurer to a judgment if the insurer had notice of the prior lawsuit an engaged in bad faith with respect to its obligation to defend the matter. All of these cases teach, however, that it is quite another matter, and unconstitutional, to impose binding liability in the absence of any notice to the insurer of the underlying claim prior to judgment being obtained, let alone in the absence of any evidence of a bad faith refusal to defend or settle the underlying claim on the part of the insurer.

Under the circumstances, Home Indemnity cannot be read so expansively as to preclude liability insurance carriers who have only agreed not to raise policy defenses to payment of final judgments obtained by third parties against the carriers' insureds, from insisting on their rights to raise other defenses to enforcement of the judgment, including that the judgment is constitutionally void.[6]

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[6] Furthermore, the PUC endorsement contained in the Condor policy does not contain an express waiver of the insurer's due process rights to challenge the judgment sought to be enforced against it. In the absence of a clear and express waiver of those constitutional

(footnote continues)

* * * Review is warranted to clarify that due process principles continue to require that liability insurers, including vehicle liability carriers, such as Condor—who did *not* have prior notice of the underlying action before the default judgment was entered against its insureds and who did *not* contribute in any manner to the entry of judgment by refusing to defend its insureds or by failing to contribute to a settlement before any adverse adjudication against the insured occurred—must be afforded an opportunity to challenge the enforcement of a constitutionally infirm judgment obtained against its insureds and the liability to be imposed on the carrier thereby.

* * *

*** * * DENOTES TEXT DELETED. BRACKETED TEXT ADDED.**

(footnote continued)
rights, Condor cannot be presumed to have waived them. See, Fuentes v. Shevin (1972) 407 U.S. 67, 95, 92 S.Ct. 1983, 2002, 32 L.Ed.2d 556 ("a waiver of constitutional rights in any context must, at the very least be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.") *see also*, D.H. Overmyer Co., Inc. of Ohio v. Frick Co. (1972) 405 U.S. 174, 185-186, 92 S.Ct. 775-782, 31 L.Ed.2d 124 (any waiver of due process rights must be shown voluntary, knowing and intelligently made with knowledge of legal consequences).